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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

APPALACHIAN POWER COMPANY, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the Constitution, an inferior court of the United States can apply prudential doctrines of justiciability—in this case, prudential "ripeness"—as a basis for refusing to exercise jurisdiction that Congress commanded the inferior court to exercise to ensure prompt, pre-enforcement review of final legislative rules promulgated by a federal agency?

2. Whether this Court's decisions in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) and its progeny allow a Court of Appeals to apply prudential doctrines of justiciability—in this case, prudential "ripeness"—to postpone judicial review of final legislative rules promulgated by a federal agency under a congressional statute that requires prompt, pre-enforcement review of such rules by the Court of Appeals based solely upon objections raised in rulemaking comments and the administrative record in existence at the time the rule is promulgated, and that explicitly precludes judicial review of such rules in later enforcement actions?

PARTIES TO THE PROCEEDINGS

The following Petitioners were parties to the proceedings below: Petitioner Appalachian Power Co., *et al.* was petitioner in No. 97-1125. Petitioner Clean Air Implementation Project was petitioner in No. 97-1117. Petitioners American Petroleum Institute and American Forest & Paper Association were petitioners in No. 97-1130. Petitioner Can Manufacturers Institute was petitioner in No. 97-1226. Petitioner Corn Refiners Association, Inc. was petitioner in No. 97-1242. Petitioners Ohio Chamber of Commerce, and Ohio Chemical Council were petitioners in No. 97-1254. Petitioner RSR Corporation was petitioner in No. 97-1261.[1]

Appalachian Power Co., *et al.*[2] is comprised of the following petitioners:

Baltimore Gas and Electric Company
Carolina Power & Light Company
Central and South West Services, Inc.
Central Hudson Gas & Electric Corporation
Central Illinois Light Company
Central Illinois Public Service Company
Central Power and Light Company
CINergy Corp.
Cleveland Electric Illuminating Company
Columbus Southern Power Company
Commonwealth Edison Company
Consumers Power Company

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[1] A list of parent companies, subsidiaries, and affiliates of Appalachian Power Co., *et al.* and other petitioners is contained in Appendix I to the Petition pursuant to Rule 29 of this Court.

[2] The following petitioners in the D.C. Circuit have withdrawn from the group that comprises Appalachian Power Co., *et al.* for purposes of the petition for certiorari: Centerior Energy Corp.; Consolidated Edison Company of New York, Inc.; Duquesne Light Company; Long Island Lighting Co.; Montaup Electric Company; New England Power Company; New York State Electric & Gas Corporation; Niagara Mohawk Power Corporation; and PECO Energy Company.

Dayton Power & Light Company, The
Delmarva Power & Light Company
Detroit Edison Company, The
Duke Energy Corporation
Florida Power Corporation
Illinois Power Company
Indiana Michigan Power Company
Indianapolis Power & Light Company
Jacksonville Electric Authority
Kansas City Power & Light Company
Kentucky Power Company
Kentucky Utilities Company
Louisville Gas and Electric Company
Madison Gas and Electric Company
Minnesota Power Company
Monongahela Power Company
(dba Allegheny Power System, Inc.)
Northern Indiana Public Service Company
Oglethorpe Power Corporation
Ohio Power Company
Ohio Valley Electric Corporation
Otter Tail Power Company
Pacificorp Electric Operations
Pennsylvania Power & Light Company
Plains Electric Generation & Transmission;
Cooperative, Inc.
Potomac Edison Company, The
(dba Allegheny Power System, Inc.)
Potomac Electric Power Company
Public Service Company of New Mexico
Public Service Company of Oklahoma
Salt River Project
South Carolina Electric & Gas Company
Southern Company, The

Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Savannah Electric & Power Company

Southwestern Electric Power Company
Tampa Electric Company
Toledo Edison Company
Tucson Electric Power Company
Union Electric Company
Virginia Power
West Penn Power Company
(dba Allegheny Power System, Inc.)
West Texas Utilities Company
Wisconsin Electric Power Company
Edison Electric Institute
National Rural Electric Cooperative Association; and
American Public Power Association

The following were petitioners in the proceedings below and have not joined petitioners seeking a writ of certiorari: American Automobile Manufacturers Association; American Iron & Steel Institute; Association of International Automobile Manufacturers; National Mining Association and Coalition for Clean Air Implementation were petitioners in No. 97-1130; National Environmental Development Association's Clean Air Regulatory Project was petitioner in No. 97-1142; Gas Processors Association was petitioner in No. 97-1169; Specialty Steel Industry of North America and Steel Manufacturers Association were petitioners in Petition No. 97-1173; The Fertilizer Institute was petitioner in No. 97-1179; The Society of the Plastics Industry, Inc. was petitioner in No. 97-1190; Chemical Manufacturers Association was petitioner in No. 97-1195; National Oilseed Processors Association was petitioner in No. 97-1241; Entergy Services, Inc. and Florida Power & Light Company, Inc. were petitioners in No. 97-1253; Corporate Environmental Enforcement Council was petitioner in No. 97-1266; American Portland Cement Alliance was petitioner in No. 97-1269; National Association of Manufacturers was petitioner in No. 97-1273; Lead Industries Association, Inc. was petitioner in No. 97-1278; American Coke & Coal Chemicals Institute was petitioner in No. 97-1281; Missouri Chamber of Commerce was petitioner in No. 97-1282; National Grain & Feed Asso-

ciation was petitioner in No. 97-1283; Electronic Industries Association was petitioner in No. 97-1286; The Aluminum Association was petitioner in No. 97-1289; The Association of Battery Recyclers, Inc. intervened below in petition No. 97-1259.

The United States Environmental Protection Agency (EPA) was Respondent in all of the proceedings, and Natural Resources Defense Council intervened on behalf of Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. ———

APPALACHIAN POWER COMPANY, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Appalachian Power Company, 57 other individual electric utilities, Edison Electric Institute, National Rural Electric Cooperative Association, American Public Power Association, American Petroleum Institute, American Forest and Paper Association, Can Manufacturers Institute, Clean Air Implementation Project, Corn Refiners Association, Ohio Chamber of Commerce, Ohio Chemical Council and RSR Corporation [1] respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on August 14, 1998.

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[1] The Petitioners and their parent companies, subsidiaries, and affiliates are listed in Appendix I to the Petition pursuant to Rule 29 of this Court.

OPINION BELOW

The opinion of the U.S. Court of Appeals in Clean Air Implementation Project, et al. v. Environmental Protection Agency, Nos. 97-1117 et al. (D.C. Cir. August 14, 1998) is reported at 150 F.3d 1200. A copy of the opinion appears in the Appendix (hereafter referred to as "App. ——") at 1a-16a.

JURISDICTION

The opinion of the U.S. Court of Appeals for the D.C. Circuit was entered on August 14, 1998. A timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on November 20, 1998. App. 17a-20a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following constitutional, statutory and regulatory provisions are set forth in the Appendix:

1. U.S. Constitution, Article I, § 8, cl. 9; Article III, § 1 (App. 23a).
2. Clean Air Act §§ 110(a), (c) & (k), 111 (a)-(c), 112(q) and 307(b), (d) & (e) (1994). (App. 24a-52a).
3. 40 CF.R. §§ 51.212, 52.12, 52.33, 60.11 and 61.12 (1997) (as amended by the final legislative rule at issue in this case), and 40 C.F.R. § 60.11 (1996) (prior to promulgation of the rule) (App. 53a-67a).

STATEMENT OF THE CASE

Legislative rules issued by administrative agencies provide the foundation for modern regulatory programs. They have binding future effect on the regulator, the regulated, and the courts. Because of the importance of legislative rules to the integrity of the regulatory programs they shape, and their coercive effects on future conduct, Con-

gress has embraced a policy of repose in many modern regulatory statutes requiring those adversely affected by legislative rules to seek circuit court review promptly after rules are promulgated and prior to their application in individual cases.

This case involves such a statute and presents the question whether the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") has the authority to apply doctrines of judicial efficiency—in this case the doctrine of "prudential ripeness"—to defeat the prompt judicial review of legislative rules commanded by Congress under § 307(b) of the Clean Air Act ("CAA" or "Act").[2] Section 307(b)(1) grants the D.C. Circuit exclusive jurisdiction to review "nationally applicable" regulations promulgated by the U.S. Environmental Protection Agency ("EPA" or "Agency") and directs that such review occur promptly (i.e., a petition for review must be filed within 60 days of publication in the *Federal Register*), and thereafter forecloses any challenge to the rules in any proceeding to apply or enforce them.

In this case, hundreds of companies and trade associations representing virtually every industry in the country filed timely petitions in the D.C. Circuit to review legislative rules adopted by EPA under the Clean Air Act. The challenged regulations affect literally thousands of emission standards adopted by EPA and the states over the previous 25 years. Despite the clear congressional directive for prompt judicial review set forth in § 307(b)(1), the D.C. Circuit dismissed all petitions without resolving any of Petitioners' facial challenges to the new rule. The sole basis for the D.C. Circuit's refusal to exercise its judicial review responsibilities under § 307 is this Court's decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (hereinafter "*Abbott Labs*") and its progeny.

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[2] 42 U.S.C. § 7401 *et seq.* (1994) (hereinafter citations will be to the Act itself unless otherwise noted).

A. The Constitutional and Statutory Context of This Case

Article III, Section 1 of the Constitution provides that "[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish." App. 23a. Article I, Section 8, Clause 9 provides, in turn, that "Congress shall have Power . . . [t]o constitute Tribunals inferior to the Supreme Court." App. 23a. In accordance with these constitutional provisions, federal courts have long recognized that the scope of "inferior" court jurisdiction, including that of the Courts of Appeals, "is constitutionally committed to the discretion of Congress." [3]

Exercising its constitutional authority, Congress established the Courts of Appeals and vested them with exclusive jurisdiction to review final legislative rules or orders under various regulatory statutes.[4] One such provision is § 307 of the Clean Air Act. App. 44a-52a. CAA § 307(b)(1) requires pre-enforcement judicial review of final legislative rules promulgated by EPA under the Act, with strict limits on both the timing and the record for review. Any nationally applicable final legislative rules promulgated by the EPA Administrator are subject to review *only* in the D.C. Circuit. To obtain review, a petition for review *must* be filed within sixty days after notice of the final rule appears in the *Federal Register*.[5]

Under § 307(d)(7), the record for review of a final rule consists *exclusively* of material in the rulemaking record. Consistent with that provision, § 307(d)(6)(C)

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[3] *See Bensalem Tp. v. American Fidelity Fire Ins. Co.*, 644 F.2d 990, 994, n.6 (3rd Cir. 1981).

[4] *See infra* notes 18-27 and accompanying text.

[5] Although § 307(b)(1) provides for limited post-60 day review, such a challenge can be heard only if based *"solely* on grounds arising after" the 60-day period and only if the petition for review is filed within 60 days after those grounds arise. (Emphasis added).

provides that legislative rules subject to review under § 307 "may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of . . . promulgation" of such rules. Moreover, under § 307(d)(7)(B), only objections raised with "reasonable specificity" during the rulemaking may be raised during judicial review. Finally, in § 307(b)(2), Congress determined that agency rules that are subject to judicial review under § 307(b)(1) *are not* subject to judicial review in enforcement proceedings.

The legislative history of § 307 explains why Congress mandated expeditious, pre-enforcement review of legislative rules adopted by EPA under the Act. According to the Senate Committee Report which accompanied the original version of § 307 (the House had no comparable provision), "the integrity of the time sequences provided throughout the Act" required that "[a]dministratively developed standards, rules and regulations under the Act" be subject to judicial review "within controlled time periods." App. 68a-69a.[6] Congress intended therefore that "the adequacy of a promulgation of any standard or regulation" would be "measure[d] . . . by the information *available at the time of such promulgation.*" App. 70a (emphasis added).

In 1977, Congress extended the deadline for filing judicial review petitions from 30 to 60 days, expanded the jurisdiction of Courts of Appeals to review all final agency actions (thereby displacing previous district court review of certain final actions),[7] and incorporated mandatory requirements for developing a rulemaking record upon which judicial review must occur. With respect to

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[6] *See also Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 849, n.15 (D.C. Cir. 1972) ("Congress was significantly concerned with expedition" of judicial review to assure that implementation of the Act's requirements "would not be needlessly delayed by litigation in the courts.").

[7] *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588-589 (1980).

the extension of the filing period, the House Committee Report underlying the 1977 amendments (there was no comparable Senate provision) explained that

> [i]n extending to 60 days the time within which a party may file a petition for review of certain EPA actions, the committee wishes to reaffirm its intent *to strictly limit section 307 challenges to those which are actually filed within that time.* . . . [U]nless a petitioner can show that the basis for his challenge did not exist or was not reasonably to be anticipated before the expiration of 60 days, *the court of appeals is without jurisdiction to consider a petition filed later than 60 days after the publication of the promulgated rule.*[8]

The House Committee Report explained that the objective of the administrative record requirements in § 307(d) was "to permit any court reviewing the rule under section 307(b) to be fairly apprised of the basis for the Administrator's action." App. 77a. Finally, reinforcing that Congress intended strict adherence to the petitioning deadline, the Senate Committee specifically *rejected* recommendations made by the Administrative Conference of the United States[9] that would have allowed the legality of rules subject to judicial review under § 307(b) to be tested in enforcement proceedings. App. 81a.

In short, Congress mandated expeditious, pre-enforcement review of final legislative rules promulgated by EPA under the Act based on whatever administrative record EPA had developed in support of the rule. Congress reinforced the mandatory regime of prompt, pre-enforcement review by explicitly barring review of those rules in enforcement proceeding. Congress contemplated later judicial review of such rules by circuit courts only where significant new and different information presented new grounds upon which to challenge the rule, and then only

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[8] App. 77a-78a (emphasis added).

[9] *See* 5 U.S.C. §§ 571-576 (1976).

within a short period after the new grounds arise. *Supra* note 5.

B. EPA's Credible Evidence Rule

The regulations at issue in this case arise under the Act, which establishes a comprehensive program for the regulation of air pollutants. With respect to stationary sources of pollution, the Act divides responsibility for regulation between the federal government and the states.

In §§ 108 and 109, Congress required EPA to set "national ambient air quality standards" ("NAAQS") to protect public health and welfare. Congress then called upon the states to take the lead in setting emission standards to achieve the NAAQS. Under § 110, each state must adopt a "state implementation plan" ("SIP") that specifices the control measures needed to attain and maintain the NAAQS, and where a state fails to adopt an appropriate SIP, EPA must develop a "federal implementation plan" ("FIP").

In addition to requiring states to develop SIPs, the Act since 1970 has required that EPA promulgate, under § 111, Federal "new source performance standards" ("NSPS") for significant new stationary sources of air pollution and promulgate, under § 112, "national emission standards for hazardous air pollutants" ("NESHAP") that apply to both new and existing sources. These emission standards, like all stationary source emission standards established under the Act, have two components: (1) a numerical emission limit on the pollutants that may be released; and (2) a test method for measuring compliance with that limit. The criteria for establishing and revising SIP, NSPS, and NESHAP standards are set out in §§ 110, 111, and 112 of the Act. App. 23a-43a.

On February 24, 1997, EPA issued what is known as the "credible evidence" ("CE") rule. 62 Fed. Reg. 8314 (1997). This final legislative rule fundamentally changed the way in which NSPS and NESHAP standards are implemented under the Act. Prior to the CE rule, prescribed reference test methods for measuring regulated emissions

were the *exclusive* means for determining threshold compliance and civil and criminal liability for violations of the NSPS and NESHAP standards. For example, before the CE rule, EPA's regulations provided that, in the case of NSPS, "[*c*]*ompliance with standards* in this part . . . *shall only be determined by performance tests established in § 60.8, unless otherwise specified in the applicable standard.*" App. 55a (emphasis added).

The CE rule changed this regulatory regime in two fundamental ways. First, EPA deleted regulatory language (i.e., the word "only") that expressly prohibited use of anything other than the specified compliance test method to measure compliance with the standards. App. 55a; 60a. Second, EPA added essentially the same language to five sets of regulations promulgated by EPA to implement NSPS, NESHAP and SIP requirements.[10]

This new regulatory language authorizes use of test methods or other evidence to measure compliance with federal and SIP emission standards even though those methods or evidence were not evaluated when the standards were originally developed (e.g., authorizing use of short term data from continuous emission monitors (CEMs) operating all the time to enforce standards that were based on a limited number of short-term stack tests conducted under controlled operating conditions). *See* 62 Fed. Reg. at 8319 (data from CEMs and continuous opacity monitors (COMs) are credible evidence for purposes of standards that were developed, and previously enforceable, using data only from periodic reference methods.) By expanding the evidence that can be used to show civil or criminal violations of standards under the Act, EPA fundamentally changed an essential component

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[10] The new language provides that nothing in the regulations, *as revised*, "shall preclude the use, including the exclusive use, of any credible evidence information, relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test or procedure had been performed." *See* App. 53a-55a; 65a-67a.

of emissions standards promulgated by the Agency and the states over more than 25 years.

Each of these revisions is a final legislative rule with immediate effect and, absent new rulemaking, is binding for the future on EPA, the states, courts, and affected parties.[11] In the preamble to the CE rule, EPA indicated that the new regulations would have immediate and unqualified effect, noting that "[t]oday's *final action* promulgates revisions to *existing* regulations, and are *not* contingent upon future promulgation[s] . . . ." 62 Fed. Reg. at 8322 (emphasis added and in original).

Under the plain terms of § 307(b) each of the regulations revised as part of the CE rule is subject to the judicial review requirements established by that provision. In addition, the revisions to Parts 52, 60 and 61 are also subject to the corollary administrative record requirements established by § 307(d). App. 45a-46a.[12]

C. The Proceedings Below

After EPA promulgated the CE rule, Petitioners challenged it on a variety of legal grounds, based on objections presented during the rulemaking as required by § 307(d)(7)(A)-(B). Among those were: (1) whether the provisions of the Act addressing civil and criminal enforcement authorized EPA to adopt the CE rule; (2) whether EPA was required to conduct rulemakings for each NSPS and NESHAP revised by the CE rule to verify that enforcement of the standards using test methods different from those on which the standards were based would be consistent with the statutory criteria in §§ 111 and 112, respectively; (3) whether EPA unlaw-

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[11] *See, e.g., United States v. Nixon*, 418 U.S. 683, 695 (1974) ("so long as this regulation is extant it has the force of law"); *Thomas v. New York*, 802 F.2d 1443, 1446-47 (D.C. Cir. 1986) (EPA bound to follow own regulations under the CAA).

[12] EPA made a finding, authorized by § 307(d)(1)(V), that the Part 51 CE revision was also subject to § 307(d) rulemaking requirements. 62 Fed. Reg. at 8327.

fully delegated to district courts and administrative judges authority reserved expressly by the Act to the EPA Administrator to establish test methods for compliance with NSPS and NESHAP emission standards; and (4) whether EPA had authority under § 110 to promulgate revisions to 40 C.F.R. Parts 51 and 52 that declare inadequate (and limit the authority and discretion of a state to adopt) any SIP that establishes a specific and exclusive method for determining compliance with emission standards.

Although the CE rule *could impact* the stringency of NSPS or NESHAPS by eliminating exclusive reliance on the test method specified in a standard and authorizing use of other test methods never evaluated by EPA in setting the standard, *supra* 8, Petitioners did not ask the D.C. Circuit to determine, in their facial challenge to the rule, whether the stringency of any particular standard had been changed. Instead, Petitioners asked the Court to determine first, whether the Agency had statutory authority to issue the rule, and second, if so, whether the Agency had complied with applicable legal and procedural requirements of the Act when it promulgated the CE rule.[13]

With respect to the 40 C.F.R. Part 51 and 52 revisions, Petitioners challenged those revisions because they violated the Federal-state division of authority established in CAA § 110 (1) by requiring states to revise SIPs that EPA had previously found were adequate under the § 110 criteria, and that EPA had failed to demonstrate in the CE rulemaking were inadequate under those criteria; and (2) by precluding the states from establishing "exclusive" methods for determining compliance when the federal government had been establishing "exclusive" compliance

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[13] With respect to the NSPS revisions, for example, Petitioners asked the lower court to find that since those revisions might increase the stringency of an NSPS standard that applied to an operating source, and since § 111 precludes application of a more stringent NSPS to sources subject to an existing NSPS, EPA was required to evaluate in a § 111 rulemaking whether the CE rule would make existing NSPS more stringent *before* it adopted the CE rule.

methods for the previous 25 years.[14] Petitioners also challenged the Part 51 and 52 revisions because they directly revised some SIPs and FIPs without EPA having followed statutorily mandated procedures.[15]

D. The D.C. Circuit's Decision

Under Article III, Section 2 of the Constitution, judicial power extends only to "cases or controversies." To determine whether an Article III case or controversy exists, courts look to three general principles: standing, finality, and constitutional ripeness.[16] Separate from these Article III principles, courts also look to a variety of prudential justiciability doctrines as a matter of their own self-governance.[17] One of these doctrines is the prudential ripeness doctrine set forth in *Abbott Labs* and its progeny. The D.C. Circuit's decision relies solely upon the pruden-

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[14] *See supra* 7-8. This Court has held that "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Train v. NRDC*, 421 U.S. 60, 69 (1975).

[15] Separately, dozens of petitions for review have been filed in the D.C. Circuit under the "grounds arising after" provision of § 307(b)(1) challenging *individual* NSPS and NESHAP standards as modified by the CE rule revisions to Part 60/61. Relying upon the D.C. Circuit's decision in this case, EPA recently moved to dismiss each of the pending petitions as prudentially unripe for review. Petitioners in those cases have opposed EPA's motion, arguing that the D.C. Circuit has an obligation under § 307(b)(1) to review the validity of those revised standards. The Part 51/52 revisions contained in the CE rule are not at issue in those petitions challenging individual federal standards, however, and therefore will remain binding legal standards unless and until EPA modifies those standards through new rulemaking.

[16] *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (standing); *Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 265, n.13 (1991) (ripeness); *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973) (finality).

[17] *See, e.g., Bennett v. Spear*, 117 S. Ct. 1154, 1161 (1997).

tial ripeness doctrine as the basis for dismissing the petitions for review in this case.

In its decision, the D.C. Circuit does not dispute that Petitioners had standing to challenge the CE rule (App. 10a, noting that "source owners and operators are . . . under an obligation to comply with EPA's emission standards"), that the "purely legal" questions raised in the challenge were "presumably ripe" for review (App. 11a-12a), or that the CE rule was final agency action (App. 8a-9a). In fact, the D.C. Circuit correctly observed that Petitioners' arguments were "that EPA promulgated the rule without statutory authority, that the revisions are unlawful because EPA failed to comply with proper rulemaking procedures, and that EPA violated the Clean Air Act by forcing states to rewrite their implementation plans." App. 5a. Nevertheless, relying upon this Court's decision in *Abbott Labs*, the D.C. Circuit refused to resolve the legal objections presented to it for review (all of which had been raised during the rulemaking and resolved by EPA) and dismissed each of the 25 petitions for review that had been timely filed challenging the CE rule.

The D.C. Circuit reached this anomalous result because, in the court's view, resolution of each of the legal arguments presented by the Petitioners ultimately turned on whether the CE rule *did in fact* alter the stringency of the NSPS and NESHAP standards. App. 9a-11a. The court explained that "[f]or all we know, application of EPA's credible evidence rule in the place a reference test may potentially affect some standards but not others." App. 10a. Moreover, "[g]iven the universe of all possible evidence that might be considered 'credible,' " the court continued, "it is impossible for us to decide now what impact the rule will have." App. 10a. For this reason, the court ruled that "[a]n enforcement action brought on the basis of credible evidence would . . . provide the factual development necessary to determine whether the new rule has affected whatever existing standard is involved." App. 10a.

Regarding Petitioners' challenge to the Part 51 and Part 52 regulations, the D.C. Circuit also found the "challenge unripe." App. 14a. Although acknowledging that "whether EPA had statutory authority" to promulgate the Parts 51 and 52 revisions "is purely a legal one," the D.C. Circuit determined that "the effect of the language in state plans specifying that the use of credible evidence is not precluded—is highly uncertain for reasons already mentioned." App. 15a. For this reason as well, the court held that "our judicial appraisal 'is likely to stand on a much surer footing in the context of a specific application of this regulation.'" App. 15a.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit is the pre-eminent circuit court in the field of federal administrative law because it has either concurrent or exclusive jurisdiction to review actions of virtually every federal administrative agency. As a consequence, this Court's seminal decisions governing federal judicial review of administrative actions and the management of such cases in the federal judicial system have sprung from D.C. Circuit. In *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, for example, this Court addressed the scope of relief that could be ordered on remand of a legislative rule. 435 U.S. 519 (1978). Similarly, in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, this Court articulated the standard of review of statutory interpretations supporting legislative rules. 467 U.S. 837 (1984). This case presents yet another opportunity arising from the D.C. Circuit to resolve a fundamental question concerning the management of the federal system of judicial review of administrative action—i.e., whether judicial review of final legislative rules can be denied on the basis of judicial efficiency doctrines despite a clear and unequivocal Congressional command that judicial review of such rules occur promptly.

This case involves more than two dozen petitions for review filed by more than one hundred petitioners representing virtually every industrial sector in the U.S. There

is, and has been, no dispute that the petitions at issue represent legitimate "cases or controversies" or that Petitioners filed timely petitions under § 307(b)(1) triggering the D.C. Circuit's exclusive jurisdiction to review the CE rule. Nonetheless, the D.C. Circuit determined in the decision below that its judgment, not that of Congress, controls when, if at all, Petitioners' legal challenges can be heard.

The Constitution grants to Congress, not the judicial branch, exclusive authority to establish "inferior" courts and to define the jurisdiciton of those courts in whatever fashion Congress deems appropriate. In the exercise of its constitutional authority, Congress saw fit to vest the D.C. Circuit with exclusive jurisdiction to review nationally applicable final legislative rules promulgated by EPA under the Act whenever a petition to review is filed within 60 days of publication of the rule in the *Federal Register*. The grant of this jurisdiction, which is embodied in § 307 (b)(1) of the Act, is without qualification.

This Court has long recognized that lower courts have a "strict duty" to exercise the jurisdiction that is conferred upon them by Congress. Accordingly, where Congress has specifically directed that judicial review occur within a specific time frame and under specified circumstances, this Court has recognized that prudential justiciability doctrines, such as the *Abbott Labs* ripeness doctrine, do *not* apply. The D.C. Circuit's decision contravenes this basic constitutional principle.

Whether the Courts of Appeals can rely upon doctrines of judicial efficiency to defeat clear congressional commands for prompt, pre-enforcement judicial review of regulatory actions has broad implications because Congress has seen fit to vest the Courts of Appeals (and in this case *only* the D.C. Circuit) with exclusive jurisdiction to review administrative actions impacting nearly every facet of modern life. For example, Congress has directed the

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[18] 15 U.S.C. §§ 1193(e), 1474(b), 2060(a) (1994) (Consumer Product Safety Commission rules).

Courts of Appeals to conduct pre-enforcement review of final agency actions arising under consumer product,[18] telecommunications,[19] food, cosmetic and drug,[20] transportation,[21] labor,[22] housing,[23] maritime,[24] agricultural,[25] banking,[26] and a wide array of environmental statutes.[27]

The impacts of the D.C. Circuit's decision are substantial. Petitioners have been denied the opportunity to obtain prompt judicial review of a binding legislative rule adopted by EPA. Petitioners must therefore either conform their behavior to ensure compliance with the standards revised by the CE rule, or risk enforcement action (and costly, continually mounting daily civil penalties, or even *criminal* penalties) for violations based on the revised standards.

By denying Petitioners their right to review in this case, the D.C. Circuit has also established a precedent allowing it and other circuit courts to replace the relatively simple and easily understood processes for judicial review established by Congress with an ill-defined and uncertain review process that will inevitably spawn substan-

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[19] 28 U.S.C. §§ 2342(1), 2344 (1994).

[20] 21 U.S.C. §§ 355(h), 360g, 371(f) (1994) (Food and Drug Administration orders).

[21] 49 U.S.C. § 46110(a) (1994).

[22] 29 U.S.C. § 660(b) (1994) (Occupational Safety and Health Administration rules).

[23] 28 U.S.C. § 2342(6) (1994).

[24] *Id.* § 2342(3)(B) (1994).

[25] *Id.* § 2342(2) (1994).

[26] 12 U.S.C. § 1818(h) (1994).

[27] *See, e.g.*, 15 U.S.C. § 2618(a) (1994) (Toxic Substances Control Act); 30 U.S.C. § 1276(a) (1994) (Surface Mining Control and Reclamation Act); 33 U.S.C. § 1369(b)(1) (Clean Water Act); 42 U.S.C. § 300j-7(a)(2) (Safe Drinking Water Act); *id.* § 4915(a) (1994) (Noise Control Act); *id.* § 6976(a) (1994) (Solid Waste Disposal Act); *id.* § 9613(a) (1994) (Comprehensive Environmental Response, Compensation, and Liability Act); 43 U.S.C. § 1349(c)(3) (1994) (Outer Continental Shelf Lands Act).

tial litigation simply to define its contours. At the very least, by suggesting that review could be relegated to dozens of potential enforcement actions in numerous different district or state courts, the lower court has effectively ensured unnecessary and confusing conflicts between circuits as to the validity of nationally applicable legislative rules.

Only this Court (apart from the D.C. Circuit) is in a position to address this fundamental question because of the unique role of the D.C. Circuit in reviewing final legislative rules of nationwide scope and effect. The normal "conflict of circuit" route for obtaining review by this Court and allowing this Court to manage the direction of judicial trends is not adequate where one circuit court has, as the D.C. Circuit does here, a disproportionate influence on the administration of a particular area of federal law.

In short, review by this Court of the D.C. Circuit decision is warranted for three reasons: (1) to reaffirm the supremacy of duly-enacted congressional law defining the jurisdiction of inferior courts, including the D.C. Circuit, and the obligation of those courts to adhere strictly to the jurisdictional mandates established by Congress; (2) to ensure that this Court's decisions regarding the application of the prudential ripeness doctrine established in *Abbott Labs* and its progeny are not misunderstood as as providing a basis for inferior courts to ignore the supremacy of duly-enacted congressional laws defining their jurisdiction; and (3) to ensure that the prudential ripeness doctrine is not misapplied in numerous other federal regulatory statutes that establish judicial review schemes similar to the one established in CAA § 307.

I. THE D.C. CIRCUIT'S DECISION CONTRAVENES CONGRESS' PLAN FOR JUDICIAL REVIEW.

Section 307(b)(1) of the Act vests exclusive jurisdiction in the D.C. Circuit to review nationally applicable rules under the Act and requires that such review occur if a petition for review has been filed within 60 days of publication in the *Federal Register*. Congress expressly

required such pre-implementation judicial review of legislative rules under the Act to allow the Executive Branch, regulated parties, and others affected by implementation of future binding regulatory requirements to avoid spending resources to conform to the rule before the rule's lawfulness could be tested in court. *Harrison v. PPG Industries*, 446 U.S. at 592.

The D.C. Circuit's decision to postpone review of Petitioners' facial challenges to these rules—challenges that were based on objections raised by Petitioners in rulemaking comments and addressed by the Agency in response to comments—ignores congressional intent in favor of judicial convenience. This the D.C. Circuit simply cannot do.

This Court has long recognized that "the Judicial power of the United States . . . is . . . dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress. . . ." *Cary v. Clarke*, 44 U.S. (3 How.) 236, 245 (1845). Congress possesses "the sole power of creating the tribunals (inferior to the supreme court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to congress may seem proper for the public good." *Id.* Where Congress directs that judicial review occur without consideration of prudential justiciability doctrines, as Congress clearly has the authority to do, those doctrines do not apply.[28]

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[28] *See, e.g., Department of Commerce v. United States House of Representatives*, Nos. 98-404, 98-564, 1999 WL 24616, at *7 (U.S. Jan. 25, 1999) (plain terms of judicial review statute eliminated any prudential ripeness concerns); *Bennett*, 117 S. Ct. at 1161 ("prudential principles . . . can be modified or abrogated by Congress"); *Raines v. Byrd*, 117 S. Ct. 2312, 2318, n.3 (1997) ("Congress' decision to grant a particular plaintiff the right to challenge an act's constitutionality . . . eliminates any prudential . . . limitations").

Congress exercised its "sole power" to establish the jurisdiction of inferior courts when it enacted § 307 of the Act. This Court has repeatedly made clear that "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." [29] As Justice Marshall observed long ago, federal courts "have no more right to decline the exercise of jurisdiction which is given, then to usurp that which is not given." *Cohens v. Virgina*, 19 U.S. (6 Wheat.) 264, 404 (1821). In at least four ways, however, the D.C. Circuit in this case has "declined" to exercise its jurisdiction contrary to the plain terms of § 307.

First, to ensure expeditious review of final legislative rules, Congress directed that review could be obtained only if a petition for review was filed within 60 days after the rule's promulgation. The plain language of § 307(b) and the relevant legislative history confirms that Congress intended *strict* compliance with the 60 day deadline. *Supra* 4-6. The D.C. Circuit's decision directs, by contrast, that judicial review will commence, if at all, at some undefined date in the future, well beyond the 60 day deadline established by Congress.

Second, Congress directed that judicial review of any final legislative rule subject to § 307(d), which includes the CE rule, must be based on objections contained in the rulemaking "record" and that "[t]he promulgated rule may not be based (in part or whole) on *any* information which has not been placed in the docket *as of the date of such promulgation.*" *Supra* 5. In direct contradiction to this clearly stated limitation, the D.C. Circuit's decision directs that judicial review, if it occurs at all, must occur based on additional "factual development" that, by definition, *cannot* conceivably be part of the

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[29] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). *See also, Bell v. Hood*, 327 U.S. 678, 681-682 (1945) (where a court's jurisdiction has been properly triggered, the court "must entertain the suit").

§ 307(d) administrative "record" on which judicial review must *exclusively* be based.[30]

Third, § 307(b)(1) unequivocally provides that a legal challenge not commenced within 60 days after notice of promulgation of the rule "shall not be subject to judicial review in civil or criminal proceedings for enforcement." App. 45a. Directly contravening this clearly and unequivocally stated congressional intent, the D.C. Circuit's decision suggests that judicial review of the CE rule can occur "in an enforcement action." App. 10a.

Finally, Congress expanded the judicial review responsibilities of circuit courts in 1977 to include all final agency actions. At that time, Congress reaffirmed its intent to control strictly how judicial review would occur under the Act by providing in § 307(e) that "[*n*]*othing in the* [*Act*] *s*hall be construed to authorize judicial review of regulations or orders of the Administrator under [the Act], *except as provided in this section.*" App. 52a (emphasis added). As the foregoing discussion illustrates, the D.C. Circuit has seen fit to ensure that judicial review of the CE rule will be allowed, if at all, in a fashion *inconsistent* with the plain terms of § 307.

Notably, the D.C. Circuit neither acknowledges, nor addresses, the extent to which its decision contravenes the plain terms of § 307. (This may be attributable, at least in part, to the fact that ripeness was not briefed by the parties below.) Instead, the court simply asserts in a conclusory and circular fashion that § 307 does not apply to

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[30] In a similar fashion, this aspect of the D.C. Circuit's decision is also inconsistent with CAA § 307(d)(7)(B). App. 51a. That provision directs that only objections raised with "reasonable specificity during the period for public comment" on the proposed rule can be the subject of judicial review. Whatever the scope or content of objections raised in a subsequent enforcement proceeding, those objections will not, by definition, have been made during the "public comment" period on the proposed rule.

action which the court believes are not prudentially ripe for review.[31]

As noted above, Congress has the "sole power" to determine the jurisdiction and "modes of exercise" of judicial authority by "inferior" courts in the U.S. *Supra* 17. Congress has exercised this authority by enacting § 307 and directing prompt, pre-enforcement review of legislative rules arising under the Act. The D.C. Circuit has a strict duty to exercise its jurisdiction under § 307 (b)(1).[32]

II. THE D.C. CIRCUIT'S DECISION IS CONTRARY TO THIS COURT'S APPLICATION OF RIPENESS PRINCIPLES.

This Court's decisions addressing the doctrine of prudential ripeness make clear that the doctrine has no application where Congress has mandated pre-enforcement review of legislative rules. In *Lujan v. National Wildlife Federation*, for example, this Court stated that prudential ripeness considerations *do not* apply "where Congress

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[31] *See* App. 8a (citing *Louisiana Envtl. Action Network v. Browner*, 87 F.3d 1379 (D.C. Cir. 1996) (hereinafter referred to as "*LEAN*"); *Association of Am. R.R.s. v. Surface Transp. Bd.*, 146 F.3d 942, 946 (D.C. Cir. 1998). Neither of the cited cases supports the D.C. Circuit's interpretation of CAA § 307, however. Unlike Petitioners in this case, for example, the petitioners in *LEAN* were found to lack Article III standing to maintain their action. *LEAN*, 87 F.3d at 1383-1384. Similarly, unlike the legislative rules at issue in this case, the guidelines at issue in *Association of American Railroads* did not create any binding future legal rights or obligations. 146 F.3d at 946-947. Conspicuously absent from the decision is any discussion of the D.C. Circuit's recognition in other cases that "Congress is free to override" prudential justiciability doctrines. *See Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1278 (D.C. Cir. 1994) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

[32] *See, e.g., Harrison v. PPG Indus.*, 446 U.S. at 593 (the responsibility of the courts is to "determine what Congress intended when it vested the courts of appeals with jurisdiction under § 307(b)(1).").

explicitly provides for our correction of the administrative process at a higher level of generality." 497 U.S. 871, 894 (1990). This Court acknowledged that "some statutes permit broad regulations to serve as the . . . object of judicial review directly, even before the concrete effects normally required for APA review are felt." *Id.* at 891. Prudential ripeness considerations can arise only where such provisions are "absent." *Id.*

This Court has repeatedly recognized that provisions like CAA § 307(b) require judicial review "at a higher level of generality." Recently, for example, in *Ohio Forestry Ass'n, Inc. v. Sierra Club*, a decision relied upon by the Court below, App. 11a, this Court unanimously sanctioned application of the prudential ripeness doctrine, but noted specifically that the legal challenge at issue in that case *had not* arisen under a provision like CAA § 307(b)(1) where "Congress has specifically instructed the courts to review [agency rules] 'pre-enforcement.'" 118 S. Ct. 1665, 1672 (1998). Similarly, in *Harrison v. PPG Industries*, this Court indicated that "the basic purpose of § 307(b)(1) [is] to provide prompt, *pre-enforcement* review of EPA action." 446 U.S. at 592 (emphasis added).

Nor are the decisions on which the D.C. Circuit relies to the contrary. As this Court recognized in *Abbott Labs*, the Food, Drug and Cosmetic Act ("FDCA") contained a separate, "special" provision requiring pre-enforcement judicial review under specified circumstances[33] and acknowledged that "when the special provisions apply, pre-

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[33] 387 U.S. at 141. The "special" judicial review provision to which the Court referred in *Abbott Labs* is strikingly similar to CAA § 307(b). It provides that "[i]n a case of actual controversy as to the validity of any order under subsection (e) of this section, any person who will be adversely affected by such order if placed in effect may at any time prior to the ninetieth day after such order is issued file a petition with the United States court of appeals . . . for a judicial review of the such order." 21 U.S.C. § 371(f)(1).

sumably they must be used. . . ." [34] Applying these principles, the Second Circuit, *unlike the D.C. Circuit,* has observed that "decisions like *Abbott Laboratories* have limited relevance . . . [where the underlying statute at issue] specifically authorizes review in the Court of Appeals . . . ." *Ciba-Geigy Corp. v. Sidamon-Eristoff,* 3 F.3d 40, 46 (2d Cir. 1993).

One practical consequence of the D.C. Circuit's misapplication of *Abbott Labs* is to preclude altogether Petitioner's right to seek judicial review of the Part 51 revisions that set forth binding standards for SIP development. Requiring Petitioners to wait until action on a particular SIP to raise their challenges to Part 51 postpones review to a point where the issue may become moot. Once a state revises its SIP to conform to the CE rule and thereafter submits it to EPA for approval, EPA can argue that it is bound to approve it under the reasoning in *Union Electric Co. v. EPA,*[35] despite Petitioners' argument that it is more stringent than necessary to meet § 110.

The only explanation for the D.C. Circuit's decision may be that the D.C. Circuit viewed, as mere dicta, this Court's statement in *Abbott Labs* that lower courts "presumably" cannot defer judicial review under statutes like § 307(b)(1). In fact, as this Court has recognized in other contexts, the requirement that lower courts exercise their jurisdiction in accordance with relevant statutory provisions enacted by Congress is not merely "presumed," but constitutionally required. This Court needs to make

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[34] *Id.* at 146. Subsequent to the *Abbott Labs* decision, the D.C. Circuit observed, in construing the FDCA's pre-enforcement review provision, that "when Congress has specified a procedure for judicial review of administrative action, *that procedure is the exclusive means of review . . . .*" *Independent Cosmetic Mfrs. and Distribs., Inc. v. United States Dep't of H.E.W.,* 574 F.2d 553, 554 (D.C. Cir. 1978) (emphasis added).

[35] 427 U.S. 246, 264-265 (1976) (Administrator has no basis to object to SIP that is more stringent than minimum requirements of Federal law, as long as it meets the minimum criteria).

clear that its decision in *Abbott Labs* does not alter this fundamental constitutional principle and that the prudential ripeness doctrine has no application in cases arising under statutory provisions such as § 307(b) where Congress mandated prompt, pre-enforcement review of the final legislative rules promulgated by EPA.

III. THE D.C. CIRCUIT'S DECISION ESTABLISHES A DANGEROUS PRECEDENT FOR OTHER CIRCUIT COURTS WITH JURISDICTION TO CONDUCT PRE-ENFORCEMENT JUDICIAL REVIEW OF FINAL LEGISLATIVE RULES AND CREATES HAVOC FOR REGULATORY AGENCIES, REGULATED ENTITIES AND THE PUBLIC AT LARGE.

For those subject to the D.C. Circuit's exclusive jurisdiction and those seeking review in circuits that may follow the D.C. Circuit's precedent in this case, the D.C. Circuit's opinion creates uncertainty about their right to challenge the legality of newly promulgated legislative rules that establish binding generic requirements governing the course of future administrative and enforcement proceedings. At the same time, regulatory authorities will remain uncertain about the legality of the regulatory programs governed by such rules, long after Congress intended such uncertainty to have been resolved by a circuit court on review.

The D.C. Circuit's decision replaces the simple and easily understood review process established by Congress with an exceedingly complex review process the most obvious effect of which will be to ensure that the federal circuit and district courts remain busy deciphering its implications.[36] One need merely begin with the simple questions of "when," "who," "what" and "how" as pertains to the D.C. Circuit's views on judicial review to get

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[36] If the D.C. Circuit finds it "impossible . . . to decide now what impact the rule will have," *see* App. 10a, how can those against whom the rule will be applied possibly "know" how their compliance obligations will be determined? This is one of the purely legal issues the D.C. Circuit refused to resolve despite the clear directive for such resolution under § 307(b).

a sense of the complexities spawned by the D.C. Circuit's decision.

The D.C. Circuit has determined that the legal issues presented by Petitioners in this case could be more readily resolved at the time of enforcement. App. 10a. When does the rule, however, become "ripe" for review? Is it when the target first learns that EPA is considering initiation of an enforcement action? Or should the target wait for the Justice Department to seek a criminal indictment? Or must the target await a criminal conviction or imposition of a penalty in a civil or administrative enforcement action?

Assuming a target can determine "when" a challenge becomes ripe, "who" must resolve the challenge? Must the target initiate a circuit court challenge to the CE rule, or a challenge to the SIP or NSPS or NESHAP emission standard being enforced? If so, which Court of Appeals? The circuit court in which the target of the enforcement action resides? The D.C. Circuit? Or should the challenge be resolved by an administrative law judge employed by EPA in an administrative enforcement action? A district court before which an enforcement action has been commenced? A state agency issuing a Clean Air Act operating permit or a state court?

And even if the questions "when" the proceeding should commence and "who" should hear it are resolved, a similar litany of questions applies to "what" must be the subject of judicial review. Is it the § 307(d) administrative docket for the CE rule only? Is it the same docket supplemented by the proceedings of an administrative adjudication? Supplemented by the proceeding of a district court action?

Finally, even if the "when," "who" and "what" of judicial review subsequent to the D.C. Circuit's decision can be resolved, the question of "how" it will be resolved would still remain. Enforcement actions differ by their very nature from one "target" to another. Whatever the

appropriate forum for review, that forum might determine that reliance upon "credible evidence" pertaining to compliance with a particular NSPS did not trigger an obligation by the Agency to commence a rulemaking to revise that NSPS under § 111 and § 307(d) because the application of the CE rule to that NSPS did not change its "stringency." [37] In a subsequent action, however, involving a different NSPS, the court might conclude that reliance upon the CE rule would, in fact, change the stringency of that NSPS. What then? Would it mean that EPA should have initiated the § 111/§ 307(d) rulemaking as originally asserted by Petitioners in this case before promulgating the CE rule? Or, would such a finding mean only that the credible evidence rule is invalid as applied to that NSPS, opening up "invalid as applied" defenses in district courts to any rule or standard being enforced under the Act?

In short, all of these questions arise from the D.C. Circuit's decision, but none of them is answered. However, none of these complexities arises if the D.C. Circuit did what it is already obligated to do—namely, comply with the will of Congress. All that Petitioners ask, and all that Congress commanded, is that the D.C. Circuit reject or accept, *but in all cases resolve*, timely legal challenges made to final legislative rules under the Clean Air Act and similar statutes. The alternative—forcing an already overburdened federal judiciary to address, on a case-by-case basis, questions of the sort enumerated above in order to invent a new judicial review system under the Act and potentially many other regulatory programs with similar judicial review regimes—is neither lawful, nor a wise use of judicial resources.

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[37] The D.C. Circuit observed in its decision that if "the rule does not change the standards, then it might be seen as a permissible exercise of the agency's general rulemaking authority under § 301 of the Act." App. 12a n.5.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the D.C. Circuit should be granted.

Respectfully submitted on behalf of all Petitioners,

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February 18, 1999

FILED

No. ——

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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

APPALACHIAN POWER COMPANY, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 21, 1998 Decided August 14, 1998

No. 97-1117

CLEAN AIR IMPLEMENTATION PROJECT, *et al.*,
Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

NATURAL RESOURCES DEFENSE COUNCIL, INC.
AND BATTERY COUNCIL INTERNATIONAL,
Intervenors

Consolidated with Nos.
97-1125, 97-1130, 97-1142, 97-1169, 97-1173, 97-1179,
97-1190, 97-1195, 97-1226, 97-1241, 97-1242, 97-1253,
97-1254, 97-1259, 97-1261, 97-1266, 97-1269, 97-1273,
97-1278, 97-1281, 97-1282, 97-1283, 97-1286, 97-1289

On Petition for Review of an Order of the
Environmental Protection Agency

Before: SILBERMAN, WILLIAMS, and RANDOLPH, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge*: Petitioners Clean Air Implementation Project and other trade associations[1] brought this action for judicial review of the Environmental Protection Agency's rule permitting the use of "credible evidence" to prove or disprove violations of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* They allege that the rule is illegal for various reasons, including lack of statutory authority and unlawful revision of substantive standards. We hold that the issues they raise are unripe and cannot be decided at this time.

I

The Clean Air Act directs the EPA Administrator to develop and promulgate three types of air pollution standards. National ambient air quality standards ("NAAQS"), issued under § 109, 42 U.S.C. § 7409, specify the maximum permissible concentrations of six criteria pollutants in the air. *See* 40 C.F.R. pt. 50. The Act makes states primarily responsible for the attainment and maintenance of the NAAQS through state-designed implementation plans, *see* 42 U.S.C. § 7410, also called "SIPs," which EPA must approve and which become federally enforceable once approved, *see id.* § 7413(a). Performance standards issued pursuant to § 111, 42 U.S.C. § 7411, regulate emissions of air pollutants from newly constructed or modified stationary sources. *See* 40 C.F.R. pt. 60. Emission standards for stationary sources of hazardous air pollutants for which no ambient air quality standard is applicable are issued pursuant to § 112, 42 U.S.C. § 7412.[2] *See* 40 C.F.R. pt. 61. EPA may enforce these

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[1] The trade associations represent various industry groups, including car manufacturers, lumber companies, steel producers, petroleum companies, and mining companies.

[2] In the Clean Air Act Amendments of 1990, Congress rewrote § 112 to include a list of 189 toxic air pollutants that EPA was required to regulate. However, § 112(q) provides that standards

standards through administrative, civil, or, with the assistance of the Attorney General, criminal actions. *See* 42 U.S.C. § 7413.

Before EPA adopted its credible evidence rule in February 1997, 62 Fed. Reg. 8314, the agency's air pollution standards specified not only the maximum permissible level of emissions, but also the performance or reference test that should be used as a means of sampling and analyzing air pollutants for the particular standard. *See, e.g.*, 40 C.F.R. §§ 60.2, 61.02. A reference test is any "generic multi-use test protocol[] that measure[s] whether a source's emissions comply with numeric performance standards." Paul D. Hoburg, *Use of "Credible Evidence" to Prove Clean Air Act Violations*, 25 B.C. ENVTL. AFF. L. REV. 771, 784-85 (1998). Subparts of Title 40 prescribe reference tests for various emission sources. Appendix A to 40 C.F.R. Part 60, for instance, contains more than fifty different test methods for determining compliance with the new source performance standards. *See also* 40 C.F.R. pt. 61, App. B (listing test methods for hazardous air pollutant standards); 40 C.F.R. pt. 51, App. M (listing recommended test methods for state implementation plans). In all, there are approximately 130 reference tests, although the same test may be "used in connection with many different performance standards." Hoburg, *supra*, at 785.

In the rulemaking challenged here, EPA added nearly identical language to five sections of its regulations, providing that nothing in them "shall preclude the use, including the exclusive use, of any credible evidence information, relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test or procedure had been performed." 40 C.F.R. § 60.11(g); *see also* 40 C.F.R.

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in effect before the date of enactment "shall remain in force and effect after such date."

§§ 51.212(c), 52.12(c), 52.33(a), and 61.12(e). The agency based these revisions on its "long-standing authority under the Act, and on amplified authority provided by the 1990 [Clean Air Act Amendments]," specifically § 113(a) and (e), 42 U.S.C. § 7413(a), (e). 62 Fed. Reg. 8314. Section 113 deals with federal enforcement of emission standards and, according to its legislative history, was amended to enhance EPA's enforcement powers. *See* S. REP. No. 101-228, at 358 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3741. EPA maintains that the "language, history and intent" of the 1990 Amendments support its credible evidence revisions. 62 Fed. Reg. 8314.

Nothing in the rule itself defines or limits the possible kinds of evidence encompassed within the phrase "credible evidence." EPA explained in the preamble to its final rule: "today's rule will make it clear that various kinds of information other than reference test data, much of which is already available and utilized for other purposes, may be used to determine compliance or noncompliance with emission standards." 62 Fed. Reg. at 8315. The preamble listed "engineering calculations, indirect estimates of emissions, and direct measurement of emissions by a variety of means" as methods on which EPA, state agencies, and industry routinely rely. *Id.* Also mentioned were "continuous emission monitoring" and "parametric monitoring" data. *Id.* To illustrate, EPA discussed the use of a continuous opacity monitor instead of Method 9, the reference test method for opacity. Method 9 requires that a "trained visible emissions observer (VEO) view a smoke plume with the sun at a certain angle to the plume in order to properly illuminate it. In contrast, a continuous opacity monitor (COM) contains a calibrated light source that provides for accurate and precise measurement of opacity at all times. Notably, EPA uses COM data to certify and re-certify the credentials of VEOs under Method 9." *Id.* at 8319. Thus, according, to the agency, continuous opacity monitoring data would be

credible evidence in lieu of Method 9. The preamble also cited two citizen suits based on credible evidence. *Id.* at 8318. In *Sierra Club v. Public Service Co.*, 894 F. Supp. 1455 (D.Colo. 1995), the court accepted opacity monitoring data and reports as means of proving emissions violations. In *Unitek Environmental Servs. v. Hawaiian Cement*, No. 95-00723 (D.Haw. 1996), the court upheld teh use of evidence that included EPA's notice of violation issued to Hawaiian Cement several months before, Hawaiian Cement's admission of noncompliance, and results of Hawaiian Cement's computerized modeling of its own particulate emissions.

Petitioners argue that EPA promulgated the rule without statutory authority, that the revisions are unlawful because EPA failed to comply with proper rulemaking procedures, and that EPA violated the Clean Air Act by forcing states to rewrite their implementation plans. The heart of the argument is that the credible evidence rule, by altering the means of determining compliance for the new source performance standards and the hazardous air pollutant standards, increases the stringency of the underlying standards. Since EPA admittedly did not conduct a rulemaking for each of the standards to which the credible evidence rule may be applied, petitioners charge that it violated the procedures required by the Act. *See* 42 U.S.C. § 7607(d). EPA's short answer is that there was no need for such proceedings because the standards have not been changed.

II

Petitioners' theory of the relationship between tests and standards is this: the test method is an integral part of the standard itself and the test method should not be changed without a full evaluation of the impact such a change might have on the standard. The theory proceeds from the fact that in developing its standards, EPA relied on tests showing the standards to be consistently achievable using the best current technology. *See* Brief of Petitioners

at 9-10. EPA then used these same test methods to determine compliance with the numerical standards it promulgated. Citing *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), petitioners argue that changing the means of testing compliance amounts to changing the standard themselves. In *Portland Cement*, the court stated that "a significant difference between techniques used by the agency in arriving at standards, and requirements presently prescribed for determining compliance with standards, raises questions about the validity of the standard." *Id.* at 396. There the court required EPA to explain the discrepancy between the method used to develop the standard and the method used to enforce it. *Id.* at 397.

Petitioners' view of the interaction between tests and standards leads them to two contentions. First, they assert that any change in compliance method or test is substantive because "use of a different test method or procedure can lead to fundamental differences in results, due to differences in analytical method, data reduction, or measurement location." Brief of Petitioners at 13-14. For example, a newer and more sensitive test might detect emissions in excess of the numerical limit at times when the original reference test would show that emissions were below the regulatory ceiling. Second, they claim that the credible evidence rule converts "periodic" standards to "continuous" ones. *See id.* at 35-42. That is, sources previously subject to standards based on "snapshot" data from infrequent "short-term" tests may now have their compliance monitored on an ongoing basis through the use of credible evidence. *Id.* at 35-36. Converting a periodic standard into a continuous one makes the standard more rigorous because, petitioners assert, continuous monitoring will capture all the fluctuations and variability inherent in emissions and thus increase each source's number of "violations." (According to petitioners, variability in emissions had previously been compensated for by

means of infrequent testing.) The issues raised by these contentions are not, we hold, justiciable at this time.

In 1967, three Supreme Court cases, decided in tandem, revolutionized judicial review of agency rulemaking. The cases—*Abbott Laboratories v. Gardner*, 387 U.S. 136; *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158; and *Gardner v. Toilet Goods, Ass'n*, 387 U.S. 167—dealt with the then-unsettled question when, if ever, courts may pass upon the validity of an agency regulation prior to its enforcement. "Before *Abbott Laboratories* the courts typically reviewed the lawfulness of an agency's rule, not when it was promulgated, but when it was enforced. After *Abbott Laboratories* reviewing practice changed radically." STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY Policy 1136 (2d ed. 1985). In deciding whether judicial review must await application of the rule in the concrete setting of an enforcement action, the Supreme Court adopted Judge Friendly's formulation in *Toilet Goods Ass'n v. Gardner*, 360 F.2d 677, 684 (2d Cir. 1966) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 156 (1951) (Frankfurter, J., concurring): there must be an evaluation of "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149.

In the three decades since *Abbott Laboratories*, "preenforcement review of agency rules and regulations has become the norm, not the exception," BREYER & STEWART, *supra*, at 1137, a trend accelerated by Congress' enactment of a host of regulatory statutes specifically providing for this. The review provision of the Clean Air Act, 42 U.S.C. § 7607(b), invoked here, is typical. It provides that a petition for judicial review must be filed within 60 days of publication of a rule in the Federal Register, 42 U.S.C. § 7607(b)(1), and that action of the EPA Administrator "with respect to which review could have been obtained . . . shall not be subject to judicial review in civil

or criminal proceedings for enforcement," 42 U.S.C. § 7607(b)(2). We have not considered this provision, or like provisions in other regulatory statutes, as requiring the court to adjudicate issues raised in a preenforcement challenge to a rule unless those issues are suitable for decision. If the issues are not of that nature, we will dismiss the petition as unripe. *See Louisiana Environmental Action Network v. Browner*, 87 F.3d 1379, 1385 (D.C. Cir. 1996); *Association of American Railroads v. Surface Transportation Bd.*, No. 97-1020, 1998 WL 343436 *4 (D.C. Cir. June 30, 1998).[3] A necessary corollary is that if the issues later become justiciable, as a result for instance of an enforcement action, the petitioner may then raise those issues, notwithstanding the portion of § 7607 (b)(2) just quoted. *See Louisiana Environmental Action Network*, 87 F.3d at 1381; *Baltimore Gas & Elec. Co. v. ICC*, 672 F.2d 146 (D.C. Cir. 1982).

As to petitioners' first contention, neither element of the *Abbott Laboratories* inquiry—fitness for judicial decision and hardship of denying relief—has been satisfied. In determining the fitness of an issue for judicial review we look to see whether the issue "is purely legal, whether consideration of the issue would benefit from a more concerte setting, and whether the agency's action is sufficiently final." *Natural Resources Defense Council, Inc. v. EPA*, 22 F.3d 1125, 1133 (D.C. Cir. 1994) (quoting *Her Majesty the Queen ex rel. Ontario v. EPA*, 912 F.2d 1525, 1532 (D.C. Cir. 1990)). EPA's credible evidence rule is final, but in contending that the rule alters the standards, petitioners have raised issues that are not purely legal, issues that are not suitable for decision in the ab-

[3] The purpose of withholding judicial review "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs.*, 387 U.S. at 148-49.

stract. *See Truckers United for Safety v. Federal Highway Administration*, 139 F.3d 934 (D.C. Cir. 1998). Judicial resolution of these issues would benefit significantly from having "the scope of the controversy . . . reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the [petitioners'] situation in a fashion that harms or threatens to harm" them. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891 (1990).

As matters now stand, there are too many imponderables. EPA insists that using credible evidence will not "change any of the numeric emission limits with which sources must comply" and that reference tests remain the benchmark against which credible evidence is measured. Brief of Respondent at 3, 11. In promulgating the rule, EPA stated that credible evidence was "not intended to and will not serve to affect the stringency of underlying emission standards by amending the nature of the compliance obligation." 62 Fed. Reg. at 8315. It explained:

> Typically, reference test methods . . . quantify the presence of particular physical attributes—for example, mass or concentration of a chemical or group of chemicals—over a specified period of time. As long as these two elements, quantification and specified time period—are retained and the data from the alternate method is related to the reference test, information generated by alternate methods yield data bearing on what the results of a reference test would have been, and the use of such information to establish compliance or noncompliance in an enforcement action will not affect the stringency of the standard.

62 Fed. Reg. at 8319. Petitioners dismiss EPA's assertions, claiming that the agency "is in denial" about the consequences of its own actions. Brief of Petitioners at 34.

Will each of the 130 or so reference tests truly be maintained as benchmarks against which credible evidence will

be measured? The tests themselves are described in "painstaking technical detail in various appendices throughout Title 40 C.F.R. chapter I." Hoburg, *supra*, at 785. For all we know, application of EPA's credible evidence rule in the place of a reference test may potentially affect some standards but not others. Moreover, credible evidence is not a closed set. Given the universe, of all possible evidence that might be considered "credible," it is impossible for us to decide now what impact the rule will have. EPA's representation that credible evidence must be "related" to the results a reference test would have shown is highly abstruse. *See* 62 Fed. Reg. 8314 (promulgation of credible evidence rule). An enforcement action brought on the basis of credible evidence would, we believe, provide the factual development necessary to determine whether the new rule has affected whatever existing standard is involved. Until then, we have the "classic institutional reason to postpone review: we need to wait for a rule to be applied to see what its effect will be." *Louisiana Environmental Action Network*, 87 F.3d at 1385 (quoting *Diamond Shamrock v. Costle*, 580 F.2d 670, 674 (D.C. Cir. 1978)).

Petitioners cannot point to any great hardship they would suffer by our deferring judicial review. EPA's rule does not require them "to engage in, or to refrain from, any conduct." *Texas v. United States*, 118 S. Ct. 1257, 1260 (1998). Unlike the drug manufacturers in *Abbott Laboratories*, but like the cosmetics companies in *Toilet Goods Ass'n v. Gardner*, 387 U.S. at 164, petitioners here need not change their behavior or risk costly sanctions. Source owners and operators are already under an obligation to comply with EPA's emission standards. If the credible evidence rule has in fact altered these standards, petitioners can raise that as a defense in an enforcement action. The burden of participating in future proceedings does not "constitute sufficient hardship for the purposes of ripeness." *Florida Power & Light Co. v. EPA*,

No. 95-1093, 1998 WL 336520, *8 (D.C. Cir. June 26, 1998). To be sure, it is easier and cheaper to mount a single challenge now rather than defend a series of enforcement actions. But "this kind of litigation cost-saving" does not "justify review in a case that would otherwise be unripe." *Ohio Forestry Ass'n v. Sierra Club*, 118 S. Ct. 1665, 1671 (1998).

This brings us to petitioners' contention that the credible evidence rule illegally converts "periodic" standards to "continuous" ones. Owners and operators of emission sources are required, according to petitioners, to meet emission limits only when intermittent tests are conducted; at all other times they are subject to no more than a "general duty" requirement to maintain good operating procedures. Brief of Petitioners at 18.

Again, we find that it would be premature for us to decide this issue now. EPA points to provisions of the Clean Air Act and implementing regulations seeming to support its view that compliance is required continuously, not periodically. Still, the effect of the credible evidence rule on compliance obligations is difficult to assess without any information or experience showing how the rule operates in particular settings. For some standards, measuring emission levels at each and every instant—*i.e.*, on a continuous basis—might affect stringency in ways that are impossible at this moment to foretell. We therefore find this issue unripe for review as well.

Because the merits of petitioners' first set of contentions are not justiciable, we do not reach their related assertion, also raised by Battery Council International as intervenor, that the Clean Air Act Amendments provide no basis for promulgating the credible evidence rule. Petitioners argue that § 113(a) of the Act addresses only the initiation of an enforcement action.[4] Although this is a

[4] Section 113(a) provides that an action to enforce compliance may be brought "[w]henever, on the basis of any information

purely legal question, and thus presumably ripe, the need for statutory authority depends in the first instance on what it is that the credible evidence rule actually accomplishes. *See Toilet Goods*, 387 U.S. at 163-64.[5]

III

Petitioners also challenge EPA's credible evidence additions to 40 C.F.R. Part 51 (requirements for the preparation, adoption, and submission of state implementation plans) and Part 52 (requirements for the approval and promulgation of implementation plans), claiming that EPA has "violate[d] the Federal-State division of authority established by [§ 110 of the Act] by requiring States to revise SIPs that EPA has found are already adequate to implement the Act." Brief of Petitioners at 28. EPA's revisions inserted language to the effect that the state plans "must not preclude the use, including the exclusive use, of any credible evidence or information. . . ." 40 C.F.R. § 51.212; *see also id.* §§ 52.12(c) (federal enforcement of state plans), 52.33(a) (compliance certifications). According to petitioners, these changes "illegally invade" the authority of states under the Clean Air Act. Brief of Petitioners at 48.

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available to the Administrator, the Administrator finds that any person has violated or is in violation of" an applicable standard. Although § 113(a) is written in terms of *finding* a violation, the procedure followed is that the Administrator issues a notice of violation and then may either issue an administrative order, § 113(d), or commence a civil action, § 113(b). *See* 42 U.S.C. § 7413.

[5] If, as EPA maintains, the rule really does not change the standards, then it might be seen as a permissible exercise of the agency's general rulemaking authority under § 301 of the Act, 42 U.S.C. § 7601(a)(1). (The agency itself does not rely exclusively on §§ 113(a) and (e), noting that the credible evidence rulemaking was "based primarily on EPA's existing authority prior to the 1990 CAA Amendments." 62 Fed. Reg. at 8320.)

During the credible evidence rulemaking, the EPA responded to comments that these amendments were unauthorized by asserting that

> EPA is not by this rulemaking revising any SIP; rather, EPA is amending the rules governing SIPs. Such rules are promulgated under EPA's authority to (1) require SIPs to provide adequate enforcement authority (*see* sections 110(a)(2)(A), (C), and (E)); (2) call for SIP revisions to correct inadequacies (*see* section 110(k)(5)); and (3) "prescribe such regulations as are necessary to carry out [the Administrator's] functions under this chapter. 42 U.S.C. § 7601.

Response to Comments at 103. EPA's brief explains that it derived its authority for the rule from § 110(a)(2)(H)(ii), under which state plans shall "provide for revision" whenever EPA finds that the plan is "substantially inadequate to . . . comply with any additional requirements established under this chapter," 42 U.S.C. § 7410(a)(2)(H)(ii), and from the statutory requirement that state plans must be "enforceable." Brief of Respondent at 41. This is hard to follow. If state plans approved by EPA met the enforceability requirement prior to EPA's adoption of the credible evidence rule, one may wonder why the state plans have now become "unenforceable" to the extent they do not permit the use of credible evidence. The pre-existing test methods, after all, are still available to determine compliance. In any event the merits of this claim are not properly before us.

Regardless whether a state might be able to challenge directly the revised regulations (no state has), petitioners cannot do so. Nothing in the amended regulations requires states to change their implementation plans. That can only occur through an independent procedure known as a "SIP call." Under § 110(k)(5), the EPA must notify a state of inadequacies in its plan and request the submission of a revised plan. 42 U.S.C. § 7410(k)(5). This

begins an extensive regulatory process that includes the publication of a proposed plan in the Federal Register for notice and comment before final approval by the agency. *See Greater Cincinnati Chamber of Commerce v. EPA*, 879 F.2d 1379 (6th Cir. 1989) (finding that SIP calls do not constitute final agency action).

This proces was set in motion before the promulgation of the rule challenged here. *See* 62 Fed. Reg. at 8327. SIP calls to various states were issued as early as 1994. EPA's notice to states included draft credible evidence language that, "if adopted by the State and submitted to EPA for aproval in the SIP, would satisfy the requirements of this SIP call." 60 Fed. Reg. 46,222, 46,225 (1995) (approving South Dakota's plan); *see also* 60 Fed. Reg. 36,361 (1995) (Kansas); 62 Fed. Reg. 17,081, 17,082 (1997) (Minnesota). When EPA published the credible evidence rule, it noted that fifteen states had submitted new plans and several had already been approved. Thus, the request that state plans be revised and the submission and approval of revised plans were not triggered by the amendments to Parts 51 and 52. In this case, petitioners have challenged neither the SIP calls nor any of the newly-approved state plans.

Even if we were to assume that revising the regulations forced the states to submit new plans—something not suggested by the record—we would find petitioners' challenge unripe. It is not at all apparent that use of credible evidence alters the emissions standards governing petitioners' activities. Although the question whether EPA had statutory authority is a purely legal one, the effect of the credible evidence rule on petitioners—that is, the effect of language in state plans specifying that use of credible evidence is not precluded—is highly uncertain for reasons already mentioned. In addition, an amicus brief submitted by state air pollution authorities indicates that states have historically used credible evidence and that some state and local air agencies have relied on credible

evidence as the exclusive basis for enforcement actions. *See* Brief of Amici Curiae at 4-5. Like the Supreme Court in *Toilet Goods*, 387 U.S. at 162, we believe that our judicial appraisal "is likely to stand on a much surer footing in the context of a specific application of this regulation."

IV

Battery Council International, as intervenor, claims that EPA has "attempted unlawfully to revise" its permit shield regulations in promulgating the credible evidence rule. Brief of Intervenor at 27.

In the 1990 Amendments, Congress established an operating permit program for certain sources of air pollution, including major stationary sources. *See* 42 U.S.C. §§ 7661-7661f. Under this program, each permit issued must include all emissions limitations and standards applicable to the source, as well as provisions concerning inspection, monitoring, compliance certification, and reporting requirements. The regulations implementing the permit program are contained in 40 C.F.R. Part 70.

Battery Council thinks the following language in EPA's preamble to the credible evidence rule "would undermine the principal purpose" of the permits:

> [although permits] can include a "permit shield" protecting [a source] from allegations that it has failed to satisfy CAA monitoring requirements, such shield does not relieve the source of its obligation to comply with the underlying emission limits or other applicable requirements being monitored. . . . In other words, . . . the source would not be shielded from allegations of noncompliance with the underlying substantive requirements (e.g., emission limits) being monitored even if the source's required monitoring failed to detect the violation.

62 Fed. Reg. at 8320. Battery Council argues that, contrary to EPA's interpretation, "permit shields also protect

sources from enforcement of 'underlying emission limits,' as long as sources comply with their permits." Brief of Intervenor at 30.

We will not reach the merits of this argument. The credible evidence rule did not change any language in Part 70. It is doubtful that the preamble alone is definite and specific enough to be a binding statement of agency policy. For one thing, the statements concerning the permit shield were not published in the Code of Federal Regulations. *See Florida Power & Light*, 1998 WL 336520, *4. For another, EPA has claimed that its statements were no more than "an interpretation" given "existing permit shield regulation," Brief of Respondent at 45, and Battery Council has presented no evidence that the preamble has a direct and immediate effect on it. In *Kennecott Utah Copper Corp. v. Department of the Interior*, 88 F.3d 1191, 1222 (D.C. Cir. 1996), we held that although a "preamble may under some circumstances be reviewable," the preamble challenged there was nevertheless not ripe because the issue presented was conjectural and "a more complete understanding of its ramifications must await a concrete application." The same holds true here. This chalenge is therefore unripe for review.

* * * *

Petitioners and intervenor raise a number of other subsidiary issues which, while we have considered fully, present no need for discussion. For the reasons stated above, we dismiss the petition for review.

So ordered.

APPENDIX B

[Filed Nov. 20, 1998]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1117

CLEAN AIR IMPLEMENTATION PROJECT,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

NATURAL RESOURCES DEFENSE COUNCIL, INC.
and BATTERY COUNCIL INTERNATIONAL,
Intervenors

Consolidated with
97-1125, 97-1130, 97-1142, 97-1169, 97-1173, 97-1179, 97-1190, 97-1195, 97-1226, 97-1241, 97-1242, 97-1253, 97-1254, 97-1259, 97-1261, 97-1266, 97-1269, 97-1273, 97-1278, 97-1281, 97-1282, 97-1283, 97-1286, 97-1289

BEFORE: Silberman, Williams and Randolph, Circuit Judges

ORDER

Upon consideration of the petitions for rehearing of petitioners Appalachian Power Co., et al. and the Clean Air Implementation Project, et al., filed September 28, 1998, and of the response thereto, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:

MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX C

[Filed Nov. 20, 1998]

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1117

CLEAN AIR IMPLEMENTATION PROJECT,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

NATURAL RESOURCES DEFENSE COUNCIL, INC. and BATTERY COUNCIL INTERNATIONAL,
Intervenors

Consolidated with
97-1125, 97-1130, 97-1142, 97-1169, 97-1173, 97-1179, 97-1190, 97-1195, 97-1226, 97-1241, 97-1242, 97-1253, 97-1254, 97-1259, 97-1261, 97-1266, 97-1269, 97-1273, 97-1278, 97-1281, 97-1282, 97-1283, 97-1286, 97-1289

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of the Suggestions for Rehearing *In Banc* of petitioners Appalachian Power Co., et al. and

the Clean Air Implementation Project, et al., the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestions be denied.

Per Curiam

FOR THE COURT:

MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judges Henderson and Tatel did not participate in this matter.

APPENDIX D

[Mandate Issued: 12/1/98]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-1117

CLEAN AIR IMPLEMENTATION PROJECT, *et al.*,
Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

NATURAL RESOURCES DEFENSE COUNCIL, INC.
and BATTERY COUNCIL INTERNATIONAL,
Intervenors

Consolidated with
97-1125, 97-1130, 97-1142, 97-1169, 97-1173, 97-1179,
97-1190, 97-1195, 97-1226, 97-1241, 97-1242, 97-1253,
97-1254, 97-1259, 97-1261, 97-1266, 97-1269, 97-1273,
97-1278, 97-1281, 97-1282, 97-1283, 97-1286, 97-1289

On Petitioners for Review of an Order of the
Environmental Protection Agency

Before: SILBERMAN, WILLIAMS and RANDOLPH, *Circuit Judges.*

JUDGMENT

These causes came on to be heard on the petitions for review of an order of the Environmental Protection Agency and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the petitions for review are dismissed, in accordance with the opinion of the Court filed herein this date.

FOR THE COURT:

MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Date: August 14, 1998

Opinion for the Court filed by Circuit Judge Randolph.

APPENDIX E

Excerpts From Articles I and III of the United States Constitution

CONSTITUTION OF THE UNITED STATES OF AMERICA

Article I, Section 8, Clause 9

ARTICLE I

* * * *

SECTION 8. The Congress shall have Power

* * * *

To constitute Tribunals inferior to the Supreme Court;

* * * *

Article III, Section 1

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

* * * *

APPENDIX F

Excerpts From Sections 110, 111, 112 and 307 of the Clean Air Act

Excerpt from Section 110 of the Clean Air Act

§ 7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall--

(A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to—

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions—

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementa-

tion plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility.

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (reating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator—

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan—

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

(J) meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification) and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for—

(i) the performance of such air quality modeling as the Administrator may prescribe for the

purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter; and

(M) provide for consultation and participation by local political subdivisions affected by the plan.

(3)(A) Repealed. Pub. L. 101-549, title I, § 101(d)(1), Nov. 15, 1990, 104 Stat. 2409.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period

permited in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d) of this title, suspensions under subsection (f) or (g) of this section (relating to temporary energy or econmic authority), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413(e) of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

(4) Repealed.| Pub. L. 101-549, title I, § 101(d)(2), Nov. 15, 1990, 104 Stat. 2409.

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations—

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program."

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d)[1] of this title or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

* * * *

(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—

(A) finds that a State has failed to make a required submisison or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or

(B) disapproves a State implementation plan submission in whole or in part,

unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

(2)(A) Repealed. Pub. L. 101549, title I, § 101(d)(3)(A), Nov. 15, 1990, 104 Stat. 2409.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) Repealed. Pub. L. 101-549, title I, § 101(d)(3)(B), Nov. 15, 1990, 104 Stat. 2409.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent

or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) Repealed. Pub. L. 101-549, title I, § 101(d)(3)(C), Nov. 15, 1990, 104 Stat. 2409.

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year

after August 7, 1977, be revised to include comprehensive measures to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards.

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

* * * *

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission

under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

(B) Completeness finding

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable,

within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

(3) Full and partial approval and disapproval

In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

(4) Conditional approval

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inade-

quacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

(6) Corrections

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

* * * *

Excerpt from Section 111 of the Clean Air Act

§ 7411. Standards of performance for new stationary sources

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which re-

flects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant. Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

(7) The term "technological system of continuous emission reduction" means—

(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

(B) a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels.

(8) A conversion to coal (A) by reason of an order under section 2(a) of the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 792(a)] or any amendment thereto, or any subsequent enactment which supersedes such Act [15 U.S.C. 791 et seq.], or (B) which qualifies under section 7413(d)(5)(A)(ii) of this title, shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection.

(b) List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards

(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within one year after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one year after such publication, such standards with such modifications

as he deems appropriate. The Administrator shall, at least every 8 years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard. Standards of performance or revisions thereof shall become effective upon promulgation. When implementation and enforcement of any requirement of this chapter indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(5) Except as otherwise authorized under subsection (h) of this section, nothing in this section shall be construed to require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance.

(6) The revised standards of performance required by enactment of subsection (a)(1)(A)(i) and (ii) of this

section shall be promulgated not later than one year after August 7, 1977. Any new or modified fossil fuel fired stationary source which commences construction prior to the date of publication of the proposed revised standards shall not be required to comply with such revised standards.

(c) State implementation and enforcement of standards of performance

(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

* * * *

Excerpt from Section 112 of the Clean Air Act

§ 7412. Hazardous air pollutants

* * * *

(q) Savings provision

(1) Standards previously promulgated

Any standard under this section in effect before the date of enactment of the Clean Air Act Amendments of 1990 [November 15, 1990] shall remain in force and effect after such date unless modified as provided in this section before the date of enactment of such Amendments or under such Amendments. Except as provided in paragraph (4), any standard under this

section which has been promulgated, but has not taken effect, before such date shall not be affected by such Amendments unless modified as provided in this section before such date or under such Amendments. Each such standard shall be reviewed and, if appropriate, revised, to comply with the requirements of subsection (d) of this section within 10 years after the date of enactment of the Clean Air Act Amendments of 1990. If a timely petition for review of any such standard under section 7607 of this title is pending on such date of enactment, the standard shall be upheld if it complies with this section as in effect before that date. If any such standard is remanded to the Administrator, the Administrator may in the Administrator's discretion apply either the requirements of this section, or those of this section as in effect before the date of enactment of the Clean Air Act Amendments of 1990.

(2) Special rule

Notwithstanding paragraph (1), no standard shall be established under this section, as amended by the Clean Air Act Amendments of 1990, for radionuclide emissions from (A) elemental phosphorous plants, (B) grate calcination elemental phosphorous plants, (C) phosphogypsum stacks, or (D) any subcategory of the foregoing. This section, as in effect prior to the date of enactment of the Clean Air Act Amendments of 1990 [November 15, 1990], shall remain in effect for radionuclide emissions from such plants and stacks.

(3) Other categories

Notwithstanding paragraph (1), this section as in effect prior to the date of enactment of the Clean Air

Act Amendments of 1990 [November 15, 1990], shall remain in effect for radionuclide emissions from non-Department of Energy Federal facilities that are not licensed by the Nuclear Regulatory Commission, coal-fired utility and industrial boilers, underground uranium mines, surface uranium mines, and disposal of uranium mill tailings piles, unless the Administrator, in the Administrator's discretion, applies the requirements of this section as modified by the Clean Air Act Amendments of 1990 to such sources of radionuclides.

(4) Medical facilities

Notwithstanding paragraph (1), no standard promulgated under this section prior to November 15, 1990, with respect to medical research or treatment facilities shall take effect for two years following November 15, 1990, unless the Administrator makes a determination pursuant to a rulemaking under subsection (d)(9) of this section. If the Administrator determines that the regulatory program established by the Nuclear Regulatory Commission for such facilities does not provide an ample margin of safety to protect public health, the requirements of this section shall fully apply to such facilities. If the Administrator determines that such regulatory program does provide an ample margin of safety to protect the public health, the Administrator is not required to promulgate a standard under this section for such facilities, as provided in subsection (d)(9) of this section.

* * * *

Excerpt from Section 307 of the Clean Air Act

§ 7607. Administrative proceedings and judicial review

* * * *

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgatingg any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411 (j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition

for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

* * * *

(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410 (c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412 (d) of this title, any standard under section 7412 (f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles on engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413 (d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean-fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the

National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Admin-

istrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept to any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

APPENDIX G

Select Regulatory Provisions From 40 C.F.R. Parts 51, 52, 60 and 61

Excerpt from 40 C.F.R. Part 51 (1997)

§ 51.212 Testing, inspection, enforcement, and complaints.

The plan must provide for—

(a) Periodic testing and inspection of stationary sources; and

(b) Establishment of a system for detecting violations of any rules and regulations through the enforcement of appropriate visible emission limitations and for investigating complaints.

(c) Enforceable test methods for each emission limit specified in the plan. For the purpose of submitting compliance certifications or establishing whether or not a person has violated or is in violation of any standard in this part, the plan must not preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test or procedure had been performed. As an enforceable method, States may use:

(1) Any of the appropriate methods in appendix M to this part, Recommended Test Methods for State Implementation Plans; or

(2) An alternative method following review and approval of that method by the Administrator; or

(3) Any appropriate method in appendix A to 40 CFR part 60.

[51 FR 40673, Nov. 7, 1986, as amended at 55 FR 14249, Apr. 17, 1990; 62 FR 8328, Feb. 24, 1997]

Excerpt from 40 C.F.R. Part 52 (1997)

§ 52.12 Source surveillance

(a) Each subpart identifies the plan provisions for source surveillance which are disapproved, and sets forth the Administrator's promulgation of necessary provisions for requiring sources to maintain records, make reports, and submit information.

(b) No provisions are promulgated for any disapproved State or local agency procedures for testing, inspection, investigation, or detection, but detailed critiques of such portions are provided to the State.

(c) For purposes of Federal enforcement, the following test procedures and methods shall be used, provided that for the purpose of establishing whether or not a person has violated or is in violation of any provision of the plan, nothing in this part shall preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test procedures or methods had been performed:

(1) Sources subject to plan provisions which do not specify a test procedure and sources subject to provisions promulgated by the Administrator will be tested by means of the appropriate procedures and methods prescribed in part 60 of this chapter unless otherwise specified in this part.

(2) Sources subject to approved provisions of a plan wherein a test procedure is specified will be tested by the specified procedure.

[37 FR 10846, May 31, 1972, as amended at 40 FR 26032, June 20, 1975; 62 FR 8328, Feb. 24, 1997]

§ 52.33 Compliance certifications.

(a) For the purpose of submitting compliance certifications, nothing in this part or in a plan promulgated by the Administrator shall preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test had been performed.

(b) For all federal implementation plans, paragraph (a) of this section is incorporated into the plan.

[62 FR 8328, Feb. 24, 1997]

Excerpt from 40 C.F.R. Part 60 (pre-"Credible Evidence" Rule)

§ 60.11 Compliance with standards and maintenance requirements.

(a) Compliance with standards in this part, other than opacity standards, shall be determined only by performance tests established by § 60.8, unless otherwise specified in the applicable standard.

(b) Compliance with opacity standards in this part shall be determined by conducting observations in accordance with Reference Method 9 in appendix A of this part, any alternative method that is approved by the Administrator, or as provided in paragraph (e)(5) of this section. For purposes of determining initial compliance, the minimum total time of observations shall be 3 hours (30 6-minute averages) for the performance test or other set of observations (meaning those fugitive-type emission sources subject only to an opacity standard).

(c) The opacity standards set forth in this part shall apply at all times except during periods of startup, shutdown, malfunction, and as otherwise provided in the applicable standard.

(d) At all times, including periods of startup, shutdown, and malfunction, owners and operators shall, to the extent practicable, maintain and operate any affected facility including associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance procedures, and inspection of the source.

(e)(1) For the purpose of demonstrating initial compliance, capacity observations shall be conducted concurrently with the initial performance test required in § 60.8 unless one of the following conditions apply. If no performance test under § 60.8 is required, then opacity observations shall be conducted within 60 days after achieving the maximum production rate at which the affected facility will be operated but no later than 180 days after initial startup of the facility. If visibility or other conditions prevent the opacity observations from being conducted concurrently with the initial performance test required under § 60.8, the source owner or operator shall reschedule the opacity observations as soon after the initial performance test as possible, but not later than 30 days thereafter, and shall advise the Administrator of the rescheduled date. In these cases, the 30-day prior notification to the Administrator required in § 60.7(a)(6) shall be waived. The rescheduled opacity observations shall be conducted (to the extent posible) under the same operating conditions that existed during the initial performance test conducted under § 60.8. The visible emissions observer shall determine whether visibility or other conditions prevent the opacity observations from being made concurrently with the initial performance test in accordance with procedures contained in Reference Method 9 of appendix B of this part. Opacity readings of portions

of plumes which contain condensed, uncombined water vapor shall not be used for purposes of determining compliance with opacity standards. The owner or operator of an affected facility shall make available, upon request by the Administrator, such records as may be necessary to determine the conditions under which the visual observations were made and shall provide evidence indicating proof of current visible observer emission certification. Except as provided in paragraph (e)(5) of this section, the results of continuous monitoring by transmissometer which indicate that the opacity at the time visual observations were made was not in excess of the standard are probative but not conclusive evidence of the actual opacity of an emision, provided that the source shall meet the burden of proving that the instrument used meets (at the time of the alleged violation) Performance Specification 1 in appendix B of this part, has been properly maintained and (at the time of the alleged violation) that the resulting data have not been altered in any way.

(2) Except as provided in paragraph (e)(3) of this section, the owner or operator of an affected facility to which an opacity standard in this part applies shall conduct opacity observations in accordance with paragraph (b) of this section, shall record the opacity of emissions, and shall report to the Administrator the opacity results along with the results of the initial performance test required under § 60.8. The inability of an owner or operator to secure a visible emissions observer shall not be considered a reason for not conducting the opacity observations concurrent with the initial performance test.

(3) The owner or operator of an affected facility to which an opacity standard in this part applies may request the Administrator to determine and to record the opacity of emissions from the affected facility during the initial performance test and at such times as may be required. The owner or operator of the affected facility shall report the opacity results. Any request to the Administrator to determine and to record the opacity of emissions from

an affected facility shall be included in the notification required in § 60.7(a)(6). If, for some reason, the Administrator cannot determine and record the opacity of emissions from the affected facility during the performance test, then the provisions of paragraph (e)(1) of this section shall apply.

(4) An owner or operator of an affected facility using a continuous opacity monitor (transmissometer) shall record the monitoring data produced during the initial performance test required by § 60.8 and shall furnish the Administrator a written report of the monitoring results along with Method 9 and § 60.8 performance test results.

(5) An owner or operator of an affected facility subject to an opacity standard may submit, for compliance purposes, continuous opacity monitoring system (COMS) data results produced during any performance test required under § 60.8 in lieu of Method 9 observation data. If an owner or operator elects to submit COMS data for compliance with the opacity standard, he shall notify the Administrator of that decision, in writing, at least 30 days before any performance test required under § 60.8 is conducted. Once the owner or operator of an affected facility has notified the Administrator to that effect, the COMS data results will be used to determine opacity compliance during subsequent tests required under § 60.8 until the owner or operator notifies the Administrator, in writing, to the contrary. For the purpose of determining compliance with the opacity standard during a performance test required under § 60.8 using COMS data,the minimum total time of COMS data collection shall be averages of all 6-minute continuous periods within the duration of the mass emission performance test. Results of the COMS opacity determinations shall be submitted along with the results of the performance test required under § 60.8. The owner or operator of an affected facility using a COMS for compliance purposes is responsible for demonstrating that the COMS meets the requirements specified in § 60.13(c) of this part, that the COMS has been

properly maintained and operated, and that the resulting data have not been altered in any way. If COMS data results are submitted for compliance with the opacity standard for a period of time during which Method 9 data indicates noncompliance, the Method 9 data will be used to determine opacity compliance.

(6) Upon receipt from an owner or operator of the written reports of the results of the performance tests required by § 60.8, the opacity observation results and observer certification required by § 60.11(e)(1), and the COMS results, if applicable, the Administrator will make a finding concerning compliance with opacity and other applicable standards. If COMS data results are used to comply with an opacity standard, only those results are required to be submitted along with the performance test results required by § 60.8. If the Administrator finds that an affected facility is in compliance with all applicable standards for which performance tests are conducted in accordance with § 60.8 of this part but during the time such performance tests are being conducted fails to meet any applicable opacity standard, he shall notify the owner or operator and advise him that he may petition the Administrator within 10 days of receipt of notification to make appropriate adjustment to the opacity standard for the affected facility.

(7) The Administrator will grant such a petition upon a demonstration by the owner or operator that the affected facility and associated air pollution control equipment was operated and maintained in a manner to minimize the opacity of emisions during the performance tests; that the performance tests were performed under the conditions established by the Administrator; and that the affected facility and associated air pollution control equipment were incapable of being adjusted or operated to meet the applicable opacity standard.

(8) The Administrator will establish an opacity standard for the affected facility meeting the above requirements at a level at which the source will be able, as indi-

cated by the performance and opacity tests, to meet the opacity standard at all times during which the source is meeting the mass or concentration emission standard. The Administrator will promulgate the new opacity standard in the FEDERAL REGISTER.

(f) Special provisions set forth under an applicable subpart of this part shall supersede any conflicting provisions of this section.

[38 FR 28565, Oct. 15, 1973, as amended at 39 FR 39873, Nov. 12, 1974; 43 FR 8800, Mar. 3, 1978; 45 FR 23379, Apr. 4, 1980; 48 FR 48335, Oct. 18, 1983; 50 FR 53113, Dec. 17, 1985; 51 FR 1790, Jan. 15, 1986; 52 FR 9781, Mar. 26, 1987]

Excerpt from 40 C.F.R. Part 60 (1997)

§ 60.11 Compliance with standards and maintenance requirements.

(a) Compliance with standards in this part, other than opacity standards, shall be determined in accordance with performance tests established by § 60.8, unless otherwise specified in the applicable standard.

(b) Compliance with opacity standards in this part shall be determined by conducting observations in accordance with Reference Method 9 in appendix A of this part, any alternative method that is approved by the Administrator, or as provided in paragraph (e)(5) of this section. For purposes of determining initial compliance, the minimum total time of observations shall be 3 hours (30 6-minute averages) for the performance test or other set of observations (meaning those fugitive-type emission sources subject only to an opacity standard).

(c) The opacity standards set forth in this part shall apply at all times except during periods of startup, shutdown, malfunction, and as otherwise provided in the applicable standard.

(d) At all times, including periods of startup, shutdown, and malfunction, owners and operators shall, to the extent practicable, maintain and operate any affected facility including associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance procedures, and inspection of the source.

(e)(1) For the purpose of demonstrating initial compliance, opacity observations shall be conducted concurrently with the initial performance test required in § 60.8 unless one of the following conditions apply. If no performance test under § 60.8 is required, then opacity observations shall be conducted within 60 days after achieving the maximum production rate at which the affected facility will be operated but no later than 180 days after initial startup of the facility. If visibility or other conditions prevent the opacity observations from being conducted concurrently with the initial performance test required under § 60.8, the source owner or operator shall reschedule the opacity observations as soon after the initial performance test as possible, but not later than 30 days thereafter, and shall advise the Administrator of the rescheduled date. In these cases, the 30-day prior notification to the Administrator required in § 60.7(a)(6) shall be waived. The rescheduled opacity observations shall be conducted (to the extent possible) under the same operating conditions that existed during the initial performance test conducted under § 60.8. The visible emissions observer shall determine whether visibility or other conditions prevent the opacity observations from being made concurrently with the initial performance test in accordance with procedures contained in Reference Method 9 of appendix B of this part. Opacity readings of portions

of plumes which contain condensed, uncombined water vapor shall not be used for purposes of determining compliance with opacity standards. The owner or operator of an affected facility shall make available, upon request by the Administrator, such records as may be necessary to determine the conditions under which the visual observations were made and shall provide evidence indicating proof of current visible observer emission certification. Except as provided in paragraph (e)(5) of this section, the results of continuous monitoring by transmissometer which indicate that the opacity at the time visual observations were made was not in excess of the standard are probative but not conclusive evidence of the actual opacity of an emission, provided that the source shall meet the burden of proving that the instrument used meets (at the time of the alleged violation) Performance Specification 1 in appendix B of this part, has been properly maintained and (at the time of the alleged violation) that the resulting data have not been altered in any way.

(2) Except as provided in paragraph (e)(3) of this section, the owner or operator of an affected facility to which an opacity standard in this part applies shall conduct opacity observations in accordance with paragraph (b) of this section, shall record the opacity of emissions, and shall report to the Administrator the opacity results along with the results of the initial performance test required under § 60.8. The inability of an owner or operator to secure a visible emissions observer shall not be considered a reason for not conducting the opacity observations concurrent with the initial performance test.

(3) The owner or operator of an affected facility to which an opacity standard in this part applies may request the Administrator to determine and to record the opacity of emissions from the affected facility during the initial performance test and at such times as may be required. The owner or operator of the affected facility shall report the opacity results. Any request to the Administrator to

determine and to record the opacity of emissions from an affected facility shall be included in the notification required in § 60.7(a)(6). If, for some reason, the Administrator cannot determine and record the opacity of emissions from the affected facility during the performance test, then the provisions of paragraph (e)(1) of this section shall apply.

(4) An owner or operator of an affected facility using a continuous opacity monitor (transmissometer) shall record the monitoring data produced during the initial performance test required by § 60.8 and shall furnish the Administrator a written report of the monitoring results along with Method 9 and § 60.8 performance test results.

(5) An owner or operator of an affected facility subject to an opacity standard may submit, for compliance purposes, continuous opacity monitoring system (COMS) data results produced during any performance test required under § 60.8 in lieu of Method 9 observation data. If an owner or operator elects to submit COMS data for compliance with the opacity standard, he shall notify the Administrator of that decision, in writing, at least 30 days before any performance test required under § 60.8 is conducted. Once the owner or operator of an affected facility has notified the Administrator to that effect, the COMs data results will be used to determine opacity compliance during subsequent tests required under § 60.8 until the owner or operator notifies the Administrator, in writing, to the contrary. For the purpose of determining compliance with the opacity standard during a performance test required under § 60.8 using COMS data, the minimum total time of COMS data collection shall be averages of all 6-minute continuous periods within the duration of the mass emission performance test. Results of the COMs opacity determinations shall be submitted along with the results of the performance test required under § 60.8. The owner or operator of an affected facility using a COMS for compliance purposes is responsible for

demonstrating that the COMS meets the requirements specified in § 60.13(c) of this part, that the COMS has been properly maintained and operated, and that the resulting data have not been altered in any way. If COMS data results are submitted for compliance with the opacity standard for a period of time during which Method 9 data indicates non-compliance, the Method 9 data will be used to determine opacity compliance.

(6) Upon receipt from an owner or operator of the written reports of the results of the performance tests required by § 60.8, the opacity observation results and observer certification required by § 60.11(e)(1), and the COMS results, if applicable, the Administrator will make a finding concerning compliance with opacity and other applicable standards. If COMS data results are used to comply with an opacity standard, only those results are required to be submitted along with the performance test results required by § 60.8. If the Administrator finds that an affected facility is in compliance with all applicable standards for which performance tests are conducted in accordance with § 60.8 of this part but during the time such performance tests are being conducted fails to meet any applicable opacity standard, he shall notify the owner or operator and advise him that he may petition the Administrator within 10 days of receipt of notification to make appropriate adjustment to the opacity standard for the affected facility.

(7) The Administrator will grant such a petition upon a demonstration by the owner or operator that the affected facility and associated air pollution control equipment was operated and maintained in a manner to minimize the opacity of emissions during the performance tests; that the performance tests were performed under the conditions established by the Administrator; and that the affected facility and associated air pollution control equipment were incapable of being adjusted or operated to meet the applicable opacity standard.

(8) The Administrator will establish an opacity standard for the affected facility meeting the above requirements at a level at which the source will be able, as indicated by the performance and opacity tests, to meet the opacity standard at all times during which the source is meeting the mass or concentration emission standard. The Administrtaor will promulgate the new opacity standard in the FEDERAL REGISTER.

(f) Special provisions set forth under an applicable subpart shall supersede any conflicting provisions in paragraphs (a) through (e) of this section.

(g) For the purpose of submitting compliance certifications or establishing whether or not a person has violated or is in violation of any standard in this part, nothing in this part shall preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test or procedure had been performed.

[38 FR 28565, Oct. 15, 1973, as amended at 39 FR 39873, Nov. 12, 1974; 43 FR 8800, Mar. 3, 1978; 45 FR 23379, Apr. 4, 1980; 48 FR 48335, Oct. 18, 1983; 50 FR 53113, Dec. 27, 1985; 51 FR 1790, Jan. 15, 1986; 52 FR 9781, Mar. 26, 1987; 62 FR 8328, Feb. 24, 1997]

Excerpt from 40 C.F.R. Part 61 (1997)

§ 61.12 Compliance with standards and maintenance requirements.

(a) Compliance with numerical emission limits shall be determined in accordance with emission tests established in § 61.13 or as otherwise specified in an individual subpart.

(b) Compliance with design, equipment, work practice or operational standards shall be determined as specified in an individual subpart.

(c) The owner or operator of each stationary source shall maintain and operate the source, including associated equipment for air pollution control, in a manner consistent with good air pollution control practice for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, review of operating and maintenance procedures, and inspection of the source.

(d)(1) If, in the Administrator's judgment, an alternative means of emission limitation will achieve a reduction in emissions of a polluant from a source at least equivalent to the reduction in emissions of that pollutant from that source achieved under any design, equipment, work practice or operational standard, the Administrator will publish in the FEDERAL REGISTER a notice permitting the use of the alternative means for purposes of compliance with the standard. The notice will restrict the permission to the source(s) or category(ies) of sources on which the alternative means will achieve equivalent emission reductions. The notice may condition permission on requirements related to the operation and maintenance of the alternative means.

(2) Any notice under paragraph (d)(1) shall be published only after notice and an opportunity for a hearing.

(3) Any person seeking permission under this subsection shall, unless otherwise specified in the applicable subpart, submit a proposed test plan or the results of testing and monitoring, a description of the procedures followed in testing or monitoring, and a description of pertinent conditions during testing or monitoring.

(e) For the purpose of submitting compliance certifications or establishing whether or not a person has violated or is in violation of any standard in this part, nothing in this part shall preclude the use, including the exclusive

use, of any credible evidence or information, relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test had been performed.

[50 FR 46292, Nov. 7, 1985, as amended 62 FR 8328, Feb. 24, 1997]

APPENDIX H

Excerpt from S. Rep. No. 91-1196

SECTION 308. JUDICIAL REVIEW

One of the uncertainties in the existing Clean Air Act is the availability or opportunity for judicial review of administratively developed and promulgated standards and regulations. Moreover, the effect on the general program of a review itself is not clear.

Administratively developed standards, rules and regulations under the Act and under this bill would clearly affect the interests of persons. The courts are increasingly adapting this test to what administrative actions are reviewable. In several recent cases [*Environmental Defense Fund, Inc.* v. *Hardin* (C.A. No. 23,813, May 28, 1970); *Barlow* v. *Collins* (397 U.S. 159, 167 (1970)); *Abbott Laboratories* v. *Gardner* (387 U.S. 136, 140-41 (1967))] the Courts have held that even in matters committed by statute to administrative discretion, preclusion of judicial review "is not lightly to be inferred . . . it requires a showing of clear evidence of legislative intent." (*E.D.F.* v. *Hardin,* supra, p. 7.) The Courts have granted this review to those being regulated and to those who seek "to protect the public interest in the proper administration of a regulatory system enacted for their benefit." (*E.D.F.* v. *Hardin* supra, p. 6.) Since precluding review does not appear to be warranted or desirable, the bill would specifically provide for such review within controlled time periods. Of course, the person regulated would not be precluded from seeking such review at the time of enforcement insofar as the subject matter applies to him alone.

Because many of these administrative actions are national in scope and require even and consistent national application, the provision specifies that any review of such actions shall be in the United States Court fo Appeals for the District of Columbia. For review of the approval or promulgation of implementation plans which run only to one air quality control region, the section places jurisdic-

tion in the U.S. Court of Appeals for the Circuit in which the affected air quality control region, or portion thereof, is located.

In order to maintain the integrity of the time sequences provided throughout the Act, the bill would provide that any review sought must be filed within 30 days of the date of the challenged promulgation or approval. It would be further provided that the filing of a petition does not operate as a stay of the application of the promulgation or decision for which review is sought, unless the party seeking such review is able to demonstrate to the court that there is a substantial likelihood that such party will prevail on the merits and that the interests of the public will not be harmed by such stay. It should be noted that the provision restricting stays would apply not only to actions brought pursuant to this section, but also to any review of an administrative action pursuant to this Act or under any provision of law.

In this section, and in two other provisions of the bill, section 115 and section 202(b)(4) the Committee directs any court reviewing any administrative promulgation or decision to presume that the findings of the Administrator related to the matter subject to review are correct. In adopting this position offered by Senator Baker, the Committee proposes to clarify for purposes of this Act the value, or weight, given to administrative findings and decisions by the reviewing court.

The Committee does not intend by this language to provide a statutory provision that establishes administrative promulgations or decisions as conclusive and thereby effectively extinguishing the right of review. Rather, the presumption of correctness established is rebuttable by proof that the administrative promulgation or decision is not supported by a prepondarence of its evidence. It should also be noted that evidence regarding any exclusion or omission of relevant material from the administrative

record may be adduced to challenge the sufficiency of the administrative record.

The committee recognizes that it would not be in the public interest to measure for all time the adequacy of a promulgation of any standard or regulation by the information available at the time of such promulgation. In the area of protection of public health and environmental quality, it is clear that new information will be developed and that such information may dictate a revision or modification of any promulgated standard or regulation established under the act. The judicial review section, therefore, provides that any person may challenge any promulgated standard, regulation, or approved or promulgated implementation plan after the date of promulgation whenever it is alleged that significant new information has become available.

New information may become available at some future date which indicates that a particular pollution agent or combination of agents is hazardous to the health of persons and therefore should be added to those pollution agents subject to the provisions of section 115. Conversely, new information may become available indicating that a pollution agent for which a prohibition had been established under section 115 is not hazardous to the health of persons. If the Secretary failed to act in either event, the promulgation could be challenged.

Excerpt from H.R. Rep. No. 95-294

SECTION 305—ADMINISTRATIVE PROCEDURES AND JUDICIAL REVIEW BACKGROUND

Under the 1970 Clean Air Act Amendments, the Administrator was directed to promulgate rules and regulations under informal rulemaking procedures. These procedures call for notice of the proposed rule, opportunity to submit written comments, public hearing (when required expressly by the act), and final promulgation of the rule.

The formal adjudicatory-type procedures of 5 U.S.C. 554, 556, and 557 were not required to be involved in the rulemaking process under the act. For some actions of the Administrator (e.g., State implementation plan approval), no procedural requirements were specified in the act.

In some ways the informal rulemaking approach has worked well. The administrative process has been quicker and more flexible than if more elaborate procedures had been required. But in several respects, the informal rulemaking procedures of the current act have been challenged as inadequate.

First, the existing Clean Air Act does not require the establishment of a clearly defined record on which agency consideration of a rule, public comments, and judicial review can be based. Thus, for instance, in *Texas* v. *EPA*, 499 F. 2d 289 (5th Cir. 1974), both the majority and the concurring opinions expressed dissatisfaction with the state of the record. Other courts have voiced similar concerns.

Second, concern was expressed about the absence of a requirement for a public hearing prior to approval or disapproval of the State implementation plan by the Administrator.[5]

Third, the legislative-type hearings provided for in the current act have been challenged as not providing an adequate opportunity to challenge the factual basis underlying the proposed rule. Thus, for instance, Representative Van Deerlin introduced and testified in favor of H.R. 2765, a bill introduced in 1975 which provided in part that "no element of an implementation plan . . . could be approved (if submitted by a State) or promulgated by the Agency, unless a hearing has been held at the State or Federal level where a record was kept and where participants were given the opportunity to examine agency officials". (H. 968).

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[5] 1973 Hearings, op. cit., pp. 813-828.

A fourth alleged procedural shortcoming of the existing act is its failure to require the Administrator of EPA to state clearly the reasons for his action. This criticism was implicit in the Court's decision in *Kennecott Copper Corp.* v. *EPA*, 462 F. 2d 846 (D.C. Cir. 1972). It was explicit in the 1973 testimony from the Director of the Texas Air Control Board:

> When EPA disapproved the hydrocarbon control strategy portion of the Texas implementation plan, it was some time before the State could obtain any indication of the reasons for the disapproval. Formal findings of fact and supportive data for the disapproval have still not been received by the State.[6]

Fifth, the Clean Air Act was arguably deficient in failing to establish an express standard of review for the courts to apply in judicial review of Agency rulemaking.

While the committee did not agree to some of the proposed solutions to these problems, it did agree that they needed to be remedied. For in the committee's view, appropriately broad administrative discretion to promulgate regulations to protect health or the environment must be restrained by thorough and careful procedural safeguards that insure an effective opportunity for public participation in the rulemaking process.

The committee was also concerned about inconsistencies in procedures, policies, practices, and legal interpretations in EPA's regional offices. These problems are highlighted by the factual situation which is detailed in *Montana Power Company* v. *EPA*, CV-76-136-BLG (D. Mont. 1977). While the committee's action on the section 108 definition of "commenced construction" makes clear its disagreement with the interpretation of the judge in that case, the case does raise important, broader issues relating to regionalization, which the committee believed should be addressed.

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[6] 1973 Hearing, op. cit., p. 814; see also p. 828.

COMMITTEE PROPOSAL

Section 305 of the committee bill establishes a new subsection 307(d) of the act. This provision of the committee bill attempts to cure each of the problems which have been identified under the current act's approach to rulemaking. At the same time, the committee bill is intended to retain the flexibility and expedition of the informal rulemaking approach. It is not intended to require formal rulemaking proceedings under the Clean Air Act.

The Record.—Section 305 of the bill clearly defines what the record for a rule consists of, and how and when material must be placed in the record. By and large, this section represents a legislative adoption of the suggestions for a rulemaking record set forth in a law review article dealing with EPA. (Pederson, "Formal Records and Informal Rulemaking," 85 *Yale L.J.* 38 (1975).)

Several points about this reform should be emphasized.

First, the new record system cannot be expected to yield its full benefits unless EPA establishes a record room in which to keep the records, and adequate staff and other resources to keep the records in order. The committee expects this to be done.

Second, the record system will not result in better records unless all those participating in the rulemaking process keep in mind the objective of creating a useful record. This means the agency should include in the record only those documents in its possession which are of genuine material relevance to the rule. Of course, the agency has at least as great an obligation to include any such documents that contradict its position as it does to include those that support it.

These central documents should where necessary cite or summarize, and place in perspective, less relevant documents on which they in turn rely.

Other participants should make their points clearly and concisely, and not submit for inclusion in the record ma-

terial of only marginal relevance, or that could have been submitted in more abbreviated form.

Third, though the committee is not requiring the adoption of a formal discovery system for use in rulemaking, it realizes that the current use of the Freedom of Information Act for this purpose will undoubtedly continue. Accordingly, it expects EPA to take any necessary administrative steps to ensure that its procedures for dealing with such requests are coordinated with the record making system established by this legislation.

Hearings.—Section 305 of the bill expands the requirements relating to public hearings to apply to specified actions of the Administrator which are not now subject to the hearing requirement.

In specific, under new section 307(d)(5) of the act, the Agency would be required to afford opportunity for a public hearing with respect to specified actions where no such opportunity is currently required to be afforded.

In regard to this provision as well as the rest of section 305, the committee intends that these procedures be required to be applied only prospectively. Thus, any rulemaking proceeding which commenced prior to date of enactment of the 1977 amendments would not be required to follow such procedures, nor would it be subject to attack in judicial review for failure to follow such procedures. Furthermore, the committee does not intend to change the established rule that even where opportunity for a hearing is required by statute that hearing may be omitted if it is clear no useful purpose would be served. *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620-22 (1973); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956).

Hearing procedures.—In general, the committee has directed the Administrator to permit opportunity for cross-examination in the course of any such hearing. There are several limits on this obligation to permit cross-examina-

tion, however,. First, the opportunity for cross-examination need only be afforded with respect to disputed issues of material fact. Second, the opportunity for cross-examination need only be afforded to the extent and in the manner which the Administrator determines is necessary and appropriate.[7] Third, of course, the committee does not intend that this procedural opportunity should override the statutory deadlines in the act. Therefore, cross-examination must be limited so as to permit adequate time for the entire rulemaking process to be concluded within such deadlines. Fourth, section 307(d)(5)(B)(iii) makes clear that the Administrator may require classes of participants with similar interests to participate through a single representative, and that he may deny cross-examination of any sort in cases where such a limiting agreement cannot be reached.

In determining the extent to which cross-examination is appropriate and necessary, the Administrator may consider the other types of opportunities for illumination of disputed issues of material fact which have been or will be afforded. Thus, for example, scientific and technical issues might be probed by discussions between panels of scientists, and these discussions may be considered in determining the extent to which cross-examination is necessary and appropriate. The use of such panels has been EPA's practice in a number of cases, and a study of them has reported that it has worked well. Williams " 'Hybrid Rulemaking' Under the Administrative Procedure Act: A Legal and Empirical Analysis", 42 *U. Chi. L. Rev.* 401, 448-455 (1975).

In cases where only one request for cross-examination is received, section 307 (d)(5)(B)(ii) permits formal cross-examination under 5 U.S.C. 556. There is no re-

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[7] Section 307(d)(5)(B)(i) of the act would confer broad discretion on the Administrator in making such determinations. It would clearly include, but not be limited to, the Authority to prevent irrelevant, repetitive, or improper cross-examination.

quirement, however, that an administrative law judge preside at the hearing. That would be inconsistent with the purpose of rulemaking to directly expose the responsible staff of the agency to the problems raised during the comment period. Instead, a responsible member of the agency staff may preside.

By using the phrase "disputed issue of material fact" to designate the allowable scope of cross-examination, the committee intends to refer to what Professor Davis calls "adjudicative facts"[8] the truth or falsity of which is subject to evidentiary proof and which could reasonably be expected to affect the outcome of the rule. The burden of proving that any issue is a "disputed issue of material fact" rests on the person seeking to engage in cross-examination.

In many cases, such facts may not be present, or even if they are, it may not be possible to say that their truth or falsity could reasonably be expected to affect the outcome of the rulemaking. The data base may be so broad, or policy considerations so dominant as to reduce to insignificance the question whether one particular "adjudicative" fact is true or not.

Even where this is true, however, a hearing must still be held whenever legitimate policy questions are still open. The statute requires an opportunity to present "views and arguments" in all such cases.

Administrative decision.—In promulgating any rule referred to in this section, the Administrator must state the basis of purpose of the final rule, just as such a statement must accompany the proposed rule. The final rule must also be accompanied by an explanation of he reasons for any major changes from the proposed version and a response to the significant comments, criticisms and data submitted during the comment period. While these statements need not be exhaustive or respond to every argu-

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[8] K. Davis, I Administrative Law Treatise, sec. 702.

ment regardless of weight, they must be of sufficient depth and complexity to show that the Administrator did consider public comments, to provide basis for States to know how to revise plans so as to be approvable (in case of a disapproval), and to permit any court reviewing the rule under section 307(b) to be fairly apprised of the basis for the Administrator's action.

Judicial review.—The committee bill expands the time available for petitioning for judicial review under section 307 of the act from 30 to 60 days. Moreover, the bill makes clear the intention of the 1970 amendments that this period for filing a section 307 judicial review petition runs from the date the final rule is published in the Federal Register, not from the date the Administrator signs the rule and transmits it for publication therein.

With repect to the change in the deadline for filing a petition for judicial review, the committee notes the recent decision in *Investment Company Institute* v. *Board of Governors of the Federal Reserve System* (F. 2d—District of Columbia Cir. 1977). In that case, the court interpreted a provision similar to section 307 of the Clean Air Act. What is of concern to the committee is the possible application of dictum in that case to the Clean Air Act. The dictum which is of concern states that with an undefined legitimate excuse, the statutory deadline (and the underlying policies of expedition and finality) may be circumvented.

In extending to 60 days the time within which a party may file a petiiton for review of certain EPA actions, the committee wishes to reaffirm its intent to strictly limit section 307 challenges to those which are actually filed within that time. The only instance in which the committee intends that later challenges may be entertained by the court of appeals are those in which the grounds arise solely after the 60th day. Thus, unless a petitioner can show that the basis for his challenge did not exist or was not reasonably to be anticipated before the expiration of

60 days, the court of appeals is without jurisdiction to consider a petition filed later than 60 days after the publication of the promulgated rule. The committee deems 60 days a legally adequate opportunity for judicial review.

Under the flexible procedures specified by the committee, disputed questions of classification may arise concerning, for example, whether a given question involves "facts" or "policy" or whether a given fact is "legislative" or "adjudicative". To prevent rulemaking from bogging down in arguments about such matters, and to underline that the agency is authorized to adapt rulemaking procedures to the individual case, the committee has limited the extent to which the Administrator's decisions on such procedural matters may be reversed during judicial review.

As indicated in new section 307(d)(9)(D) of the act the court may reverse any "rule" if that action is taken "without observance of procedure required by law". In deciding whether or not such reversal is warranted on procedural grounds, the court is directed to consider two factors. The first is whether the Administrator's determination on the procedural point is "arbitrary or capricious". (Section 307(d)(5)(C)).

The second is whether the procedural errors "were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." (Section 307(d)(8)). Only if the reviewing court can make affirmative findings as to each of these questions would it be authorized to reverse the Administrator's action on the ground that it was "without observance of procedures required by law".

The committee bill would explicitly adopt the "substantial evidence" test for judicial review of the substance of rules under the Clean Air Act. Neither this provision, nor the requirement of a record, hearing or limited cross-examination is meant to imply criticism of the courts in

their past reviews of administrative action under the act. Those reviews have in general been thorough and searching. Nor is the purpose of this provision to shift the traditional burden of proof in judicial review of administrative action. The traditional presumption of validity would remain in effect and the petitioner would, of course, bear the burden of showing that the rule is invalid. Thus, the purpose of the committee's provision in this regard is to endorse the court's practice of engaging in searching review without substituting their judgment for that of the Administrator and to assure that no retreat to a less search approach takes place.

The committee recognizes that the factual support needed for a rule may vary greatly according to the subject being addressed, and that rules on some subjects, such as procedures, may not require any factual basis at all. There is no intention to increase the amount of "factual" support now required to support "policy judgments where no factual certainties exist or where facts alone do not provide the answer", *Industrial Union Department, AFL-CIO* v. *Hodgson,* 499 F.2d 467, 476 (D.C. Cir. 1974).[9] Nor is there any intent to diminish the Administrator's authority to adopt precautionary regulations based on a showing of risk, which has been confirmed by the amendments to various sections of the Clean Air Act set forth in section 102 of this bill.

Section 307(d)(7)(B) would specify the circumstances in which a reviewing court may consider data and arguments that were not presented to the agency during the rulemaking. Even in such cases, however, the Agency must first be given an opportunity to pass on the significance of the materials and determine whether supple-

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[9] Thus, the committee bill would confirm the judgment of the Court in upholding EPA regulations in *Texas* v. *EPA,* 499 F. 2d 289 (5th 1974), where the Court found there was no better basis of support for the State's assumptions about hydrocarbon reactivity than for EPA's assumptions.

mentary proceeding are called for or not. Thus, the committee bill confirms the court's decision in *Oljato Chapter of the Navajo Tribe* v. *Train,* 515 F.2d 654 (D.C. Cir. 1975).

Subsection (c) of section 305 of the bill is intended to clarify some questions relating to venue for review of rules or orders under the act. Paragraph (1) of that subsection makes it clear that any nationally applicable regulations promulgated by the Administrator under the Clean Air Act could be reviewed only in the U.S. Court of Appeals for the District of Columbia. These would include, to mention but a few examples, regulations to carry out the nonattainment policy referred to in section 117 of this bill and regulations to effectuate motor vehicle assembly-line test provisions of section 206 of the act or inspection/maintenance requirements under section 208 of this bill.

Subsection (c)(2) of section 305 provides for essentially locally, statewide, or regionally applicable rules or orders to be reviewed in the U.S. court of appeals for the circuit in which such locality, State, or region is located. This provision applies, except as otherwise provided in paragraph (4), to the Administrator's action in approving or promulgating an implementation plan for any State.

On the other hand, if an action of the Administrator is found by him to be based on a determination of nationwide scope or effect (including a determination which has scope or effect beyond a single judicial circuit), then exclusive venue for review is in the U.S. Court of Appeals for the District of Columbia, under paragraph (4).

In adopting this subsection, the committee was in large measure approving the portion of the Administrative Conference of the United States recommendation section 305.76—4(A), that deals with venue.[10] The committee's view also concurs, however, with the comments, concerns, and recommendation contained in item No. 1 of

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[10] See 41 Fed. Reg. 56767-69, December 30, 1976.

the separate statement of G. William Frick, which accompanied the Administrative Conference's views.[11]

Also, as indicated earlier, the committee bill incorporates recommendation D2 of the Administrative Conference on extending the period for petitioning for judicial review in the court of appeals.

However, in no event should these provisions be construed as endorsement of the remainder of the Administrative Conference's recommendations. Some of these recommendations, such as those contained in items B and C, were simply not considered by the committee. Others (such as the recommendations in D1 and D3, were rejected.[12]

The committee also included amendments to section 114 of the act in this section to assure that the authorities contained in section 114 could be used for the purpose of implementing or enforcing any provision of the act with respect to any person other than a new motor vehicle manufacturer. Adequate authority for implementing or enforcing provisions of the act with respect to new motor vehicle manufacturers are contained in section 209 of the bill.

The amendments to section 114 extend beyond persons owning or operating emission sources. Thus, for instance, these authorities may be applied to fuel or fuel additive manufacturers or suppliers, or to any other person subject to a requirement, permit, condition, certification, or limitation under the act.

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[11] *Id.* at 56768.

[12] See supra in this section for a discussion of the committee's views on item D3. On recommendation D3, largely for the reasons stated in the separate statement of G. William Frick, the committee oposed the Conference's recommendation. See also *Getty Oil Co.* v. *Ruckelshaus*, 467 F. 2d (3d Cir. 1972); *Lloyd A. Fry Roofing Co.* v. *EPA*, 415 F. Supp. 799 (W.D. Mo. 1976).

Section 305(e) of the bill contains measures necessary for rational administration of a regional system. In no way, however, are these provisions intended to require EPA to continue its regional-based system of administration of the act.

If the Agency chooses to continue to rely on this approach, it must do so subject to the following constraints. First, there must be reasonable uniformity in the criteria, procedures, and policies applied by the various regional offices under the act. Thus, use of different air quality models in different regions for the purposes of implementing the provision requiring prevention of significant deterioration would no longer be permitted. Second, regional offices would be required to identify potential inconsistencies and the Administrator must provide for their expeditions resolution and for policy standardization. Third, no legal interpretation of the regional offices would be entitled to legal weight unless approved in writing by the Office of General Counsel. This provision, designed to prevent instances such as those detailed in the *Montana Power* case (referred to above), would not prevent regional offices from applying OGC approval legal interpretations to specific factual situations in the regions, but would prevent inconsistent legal interpretations of the act and regulations thereunder in different regions.

Finally, the section requires the Administrator to assure at least an adequate quality audit of State efforts in carrying out the act. Particular attention is directed to the need for adequate federal review of State permitting of new and modified sources and of State enforcement efforts.

APPENDIX I

PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

The following is a list of the individual electric utility petitioners, their parent companies, subsidiaries, and affiliates:

Alabama Power Company

(a subsidiary of Southern Company)

Appalachian Power Company

(a subsidiary of American Electric Power Company, Inc.)

Subsidiaries:

Central Operating Company

Baltimore Gas and Electric Company

Subsidiaries:

Constellation Energy Projects & Services, Inc.
Constellation Energy Source, Inc.
Constellation Enterprises, Inc.

Subsidiaries:

BGE Home Products & Services, Inc.
Constellation Power, Inc.
Constellation Investments, Inc.
Constellation Real Estate Group, Inc.

Joint Venture:

Safe Harbor Water Power Corp.

Carolina Power & Light Company

Subsidiaries:

CaroHome, LLC
Caronet, LLC
SRS

Central and South West Services, Inc.

(a subsidiary of Central and South West Corporation)

Central Hudson Gas & Electric Corporation

Subsidiaries:

C H Resources, Inc.
Central Hudson Cogeneration, Inc.
Central Hudson Enterprises
Central Hudson Resources, Inc.
Greene Point Development Corp.
Phoenix Development Co., Inc.

Central Illinois Light Company

(a subsidiary of CILCORP INC.)

Subsidiaries:

CILCO Energy Corp.
CILCO Exploration & Development Co.

Central Illinois Public Service Company

(a subsidiary of Ameren Corporation)

Central Power and Light Company

(a subsidiary of Central and Southwest Corporation)

CINergy Corp.

Subsidiaries:

Cinergy
Cinergy Corp.

Subsidiaries:

Miami Power Corp.
Tri-State Improvement Co.
Union Light, Heat & Power Co.
The West Harrison Gas & Electric Co.

Subsidiaries:

Cinergy Investments, Inc.

CGE Corporation
CGE Eck, Inc.
CG&E Resource Marketing, Inc.
PSI Power Resource Development, Inc.
PSI Power Resource Operations
Power Equipment Supply Company

Cinergy Services, Inc.
K O Transmission Company

Subsidiaries:

Lawrenceburg Gas Co.

Cleveland Electric Illuminating Co.

(a subsidiary of FirstEnergy)

Columbus Southern Power Company

(a subsidiary of American Electric Power Company, Inc.)

Subsidiaries:

Colomet, Inc.
Conesville Coal Preparation Company
Simco, Inc.

ComEd Co. (formerly Commonwealth Edison)

(a subsidiary of Unicom Corporation)

Subsidiaries:

Commonwealth Research Corp.
Concomber, Ltd.
Cotter Corp.
Edison Development Canada, Inc.

Consumers Energy (formerly Consumers Power Co.)

(a subsidiary of CMS Energy Corporation)

Subsidiaries:

Michigan Gas Storage Co.

Dayton Power & Light Company, The

(a subsidiary of DPL Inc.)

Delmarva Power & Light Company

(a subsidiary of Conectiv)

Subsidiaries:

Delmarva Capital Investments, Inc.
Delmarva Energy Company
Delmarva Industries, Inc.
Delmarva Services Company

Affiliate:

Atlantic City Electric Company

DTE Energy Company (formerly Detroit Edison Company, The)

Subsidiaries:

The Edison Illuminating Co. of Detroit
Midwest Energy Resources Co.
Syndeco Realty

Duke Energy Corporation (formerly Duke Power Company)

Subsidiaries:

Algonquin Gas Transmission Corporation
Crescent Resources, Inc.
Duke Energy Field Services, Inc.

Subsidiary:

Trunkline Gas Co.

Duke Energy International, L.L.C.
Duke Engineering & Services, Inc.
Duke Power Company McGuire Nuclear
Duke Power Oconee Nuclear Station
Nantahala Power & Light Company
National Helium Corporation
TEPPCO Partners, L.P.

Subsidiary:

Texas Eastern Production Pipelines Company, L.P.

Subsidiary:

Trans-Ohio Pipeline Company

Texas Eastern Transmission Corporation
Trunkline LNG Co.
Duke/Fluor Daniel
Lachmar
Westana Gathering Company

FirstEnergy Corporation

(a merger of Centerior Energy and Ohio Edison)

Subsidiaries:

The Cleveland Electric Illuminating Company
Ohio Edison Company

Subsidiaries:

Ohio Edison Company—Akron Division
Ohio Edison Company—Springfield Division
Ohio Edison Company—Stark Division
Ohio Edison Company—Western Division
Ohio Edison Company—Youngstown Division
OES Capital, Inc.
OES Fuel, Incorporated
Pennsylvania Power Co.

The Toledo Edison Company

Florida Power Corporation

(a subsidiary of Florida Progress Corporation)

Georgia Power Company

(a subsidiary of Southern Company)

Subsidiary:

Southern Electric Generating Company

Gulf Power Company

(a subsidiary of Southern Company)

Illinois Power Company

(a subsidiary of Illinova Inc.)

Subsidiaries:

IP Gas Supply Co.
Illinois Power Fuel Co.
Electric Energy, Inc.

Indiana Michigan Power Company

(a subsidiary of American Electric Power Company, Inc.)

Subsidiaries:

Blackhawk Coal Co.
Price River Coal Co., Inc.

Indianapolis Power & Light Company

(a subsidiary of IPALCO Enterprises, Inc.)

Jacksonville Electric Authority

Kansas City Power & Light Company

Subsidiaries:

KLT Gas, Inc.
KLT Inc.

Subsidiaries:

KLT Energy Services, Inc.
KLT Investments
KLT Power, Inc.

KLT Telecom Inc.
Wymo Fuels Inc.

Subsidiaries:

Red Hill Coal Co.

Wolf Creek Nuclear Operating Corp.

Kentucky Power Company

(a subsidiary of American Electric Power Company, Inc.)

Kentucky Utilities Company

(a subsidiary of KU Energy)

Louisville Gas and Electric Company

(a subsidiary of LG&E Energy Corp.)

Madison Gas and Electric Company

Subsidiaries:

Central Wisconsin Development Corporation
Great Lakes Energy Corp.

Subsidiary:

American Energy Management
National Energy Management, LLC

MAGAEL, Inc.

Minnesota Power

Subsidiaries:

Adesa Corporation
Adesa, Inc.

Subsidiary:

Adesa Pittsburgh Auto Auction

Automotive Finance Corp.
BNI Coal, Ltd.
Energy Land, Incorporated
Florida Water, Inc.
Lehigh Utilities Inc.
Rainy River Energy Corporation
RendField Land Company, Inc.
Superior Water, Light & Power Company
Synertec, Incorporated
Topeka Group, Incorporated

Subsidiary:

Heater Utilities, Incorporated

UtilEquip, Incorporated
Capital Re Corporation

Mississippi Power Company
(a subsidiary of Southern Company)

Monongahela Power Company

(a subsidiary of Allegheny Energy, Inc.)

Northern Indiana Public Service Company

(a subsidiary of NIPSCO Industries, Inc.)

Subsidiaries:

NIPSCO Exploration Co., Inc.
Shore Line Shops, Inc.

Oglethorpe Power Corp.

Subsidiaries:

Black Diamond Energy, Inc.

Ohio Power Company

(a subsidiary of American Electric Power Company, Inc.)

Subsidiaries:

Central Ohio Coal Co.
Southern Ohio Coal Co.
Windsor Coal Co.

Ohio Valley Electric Corporation

Subsidiary:

Indiana Kentucky Electric Corporation

Otter Tail Power Company

Subsidiary:

Minnesota-Dakota Generating Co.

PacifiCorp

Subsidiaries:

Pacific Power & Light Company
Utah Power & Light Company

Centralia Mining Company
Energy West Mining Company
Glenrock Coal Company
Pacific Minerals, Inc.
PacifiCorp Group Holdings Company

Subsidiary:

PacifiCorp Financial Services, Inc.

Subsidiaries:

Paccom Leasing Corporation
PacifiCorp Aviation (Holdings), Inc.
PacifiCorp Credit, Inc.

PacifiCorp Trans, Inc.

Subsidiaries:

Cascade Autovon Co.
Gem State Utilities Corporation
Inter Island Telephone Co., Inc.
International Communications Holdings, Inc.
Northwestern Telephone Systems, Inc.
Pacific Telecom Cellular, Inc.
Telephone Utilities of Alaska, Inc.
Telephone Utilities of Eastern Oregon, Inc.
Telephone Utilities of Oregon, Inc.
Telephone Utilities of Washington, Inc.

TPC Corporation

Powercor Australia-Limited

Pennsylvania Power and Light Company (Now PP&L Resources)

Subsidiaries:

Pennsylvania Power & Light Company—Harrisburg Div.

Pennsylvania Power & Light Company—
Lancaster Div.
Pennsylvania Power & Light Company—
Lehigh Div.
Pennsylvania Power & Light Company—
Northeast Div.
Pennsylvania Power & Light Company—
Susquehanna Div.
CEP Group, Inc.

Subsidiary:

Power Markets Development Company

Interstate Energy Co.
Pennsylvania Coal Resources Corp.

Subsidiary:

Pennsylvania Mines Corp.

Subsidiary:

Rushton Mining Co.

Realty Co. of Pennsylvania

Subsidiaries:

BDW Corp.
Greene Manor Coal Co.
Lady Jane Collieries, Inc.

Safe Harbor Water Power Corp.

Plains Electric Generation & Tranmission Cooperative, Inc.

Potomac Edison Company, The

(a subsidiary of Allegheny Energy, Inc.)

Potomac Electric Power Company

Subsidiary:

Potomac Capital Investment Corporation

Public Service Company of New Mexico

Subsidiaries:

Meadows Resources, Inc.
Paragon Resources, Inc.
Sunbelt Mining Co., Inc.
Sunterra Gas Gathering Company
Sunterra Gas Processing Company

Public Service Company of Oklahoma

(a subsidiary of Central and Southwest Corporation)

Subsidiaries:

Public Service Company of Oklahoma—
Eastern Division
Public Service Company of Oklahoma—
Mantulsa Division
Public Service Company of Oklahoma—
Northern Division
Public Service Company of Oklahoma—
Western Division

Salt River Project Agricultural Improvement and Power District

Savannah Electric & Power Company

(a subsidiary of Southern Company)

South Carolina Electric & Gas Company

(a subsidiary of SCANA Corporation)

Southern Company

Subsidiaries:

Alabama Power Company
Georgia Power Company

Subsidiary:

Southern Electric Generating Company

Gulf Power Company
Mississippi Power Company
Savannah Electric & Power Company
Southern Communications Services
Southern Company Services, Inc.
Southern Development and Investment Group
Southern Nuclear

Southwestern Electric Power Company

(a subsidiary of Central Southwest Corporation)

Tampa Electric Company

(a subsidiary of TECO Energy, Inc.)

Subsidiaries:

TECO Coal Corp.
TECO Coalbed Methane, Inc.

Toledo Edison Co.

(a subsidiary of FirstEnergy)

Tucson Electric Power Company

(a subsidiary of UniSource Energy Corporation)

Subsidiaries:

Advanced Energy Technologies
Global Solar Energy
Nations Energy Corporation
Southwest Energy Solutions, Inc.
Southwest Power Productions

Union Electric Company

(a subsidiary of Ameren Corporation)

Subsidiary:

Union Electric Development Corporation

Virginia Electric

(a subsidiary of Dominion Resources, Inc.)

West Penn Power Company

(a subsidiary of Allegheny Energy, Inc.)

West Texas Utilities Company

(a subsidiary of Central and South West Corporation)

Wisconsin Electric Power Company

(a subsidiary of Wisconsin Energy Corporation)

The following is the other petitioner with a parent or subsidiary to list under Rule 29.

RSR Corporation

(a subsidiary of Quexco, Inc.)

The following petitioners have no parents or subsidiaries to list pursuant to Rule 29.

American Forest and Paper Association, Inc.

American Public Power Association

American Petroleum Institute

Can Manufacturers Institute

Clean Air Implementation Project

Corn Refiners Association

Edison Electric Institute

Ohio Chamber of Commerce

Ohio Chemical Council

National Rural Electric Cooperative Association

Supreme Court, U.S.
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No. 98-1330

In the Supreme Court of the United States

APPALACHIAN POWER COMPANY, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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18pp

QUESTION PRESENTED

Whether the court of appeals properly dismissed petitions for review of the Environmental Protection Agency's "credible evidence" regulations as not ripe for judicial review.

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In the Supreme Court of the United States

No. 98-1330

APPALACHIAN POWER COMPANY, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 150 F.3d 1200.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1998. A petition for rehearing was denied on November 20, 1998 (Pet. App. 17a-20a). The petition for a writ of certiorari was filed on February 18, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Environmental Protection Agency (EPA) administers the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.* EPA has amended its CAA regulations to clarify that EPA and the States may evaluate whether regulated

entities are in compliance with those regulations through the use of any credible evidence bearing on compliance, rather than through the use of only those specific tests that are identified in EPA or state regulatory standards. See 40 C.F.R. 51.212(c), 52.12(c), 60.11(a), (f) and (g) (the credible evidence provisions). Petitioners, which are industrial entities subject to the CAA regulations, filed petitions for review in the United States Court of Appeals for the District of Columbia Circuit to challenge the credible evidence provisions. The court of appeals dismissed those petitions for review on ripeness grounds, holding that the validity of petitioners' claims could not be evaluated in the absence of a specific enforcement action. Pet. App. 1a-16a.

1. The CAA directs EPA to promulgate three primary types of nationally applicable standards relevant to stationary sources of air pollution: National Ambient Air Quality Standards (NAAQS); New Source Performance Standards (NSPS); and National Emission Standards for Hazardous Air Pollutants (NESHAP). The NAAQS regulations specify the maximum permissible concentrations of six "criteria" pollutants (ozone, sulfur dioxide, lead, particulate matter, carbon monoxide, and nitrogen dioxide), which are attained primarily through state-designed control strategies set out in State Implementation Plans (SIPs). See CAA §§ 109-110, 42 U.S.C. 7409-7410; see also 40 C.F.R. Pts. 50-51. The NSPS regulations establish numerical emission standards for specific categories of stationary sources. See CAA § 111, 42 U.S.C. 7411; 40 C.F.R. Pt. 60. The NESHAP regulations establish emission standards for stationary sources of certain hazardous air pollutants for which there are no ambient air quality standards. See CAA § 112, 42 U.S.C. 7412; 40 C.F.R. Pt. 61. The emission

standards are enforced through administrative, civil, or criminal sanctions. *E.g.*, CAA § 113, 42 U.S.C. 7413. See Pet. App. 2a-3a.

When EPA first promulgated its SIP, NSPS, and NESHAP regulations, it specified not only the numerical value of the particular standards, but also specific performance or reference tests to be used for determining compliance with each standard. See Pet. App. 3a. In 1997, EPA adopted the credible evidence provisions at issue here, which state (in virtually identical language) that nothing in the SIP, NSPS, and NESHAP regulations "shall preclude the use, including the exclusive use, of any credible evidence or information, relevant to whether a source would have been in compliance with applicable requirements if the appropriate performance or compliance test or procedure had been performed." 40 C.F.R. 60.11(g); see 40 C.F.R. 51.212(c), 52.12(c), 60.11(a) and (f). See 62 Fed. Reg. 8314 (1997); Pet. App. 3a-4a.

EPA adopted the credible evidence provisions to address the practicalities of environmental enforcement. EPA has determined, as a matter of experience and technological developments, that various tests and techniques can yield the same measurement of environmental compliance as the performance or reference tests set out in EPA's regulations. As an example, a "continuous opacity monitor" containing a calibrated light source can provide compliance data with at least the same level of reliability as an EPA reference test known as "Method 9," which requires that "a trained visible emissions observer (VEO) view a smoke plume with the sun at a certain angle to the plume in order to properly illuminate it." See 62 Fed. Reg. at 8319. Under the credible evidence provisions, EPA can, in appropriate circumstances, employ continuous opacity

monitoring, instead of Method 9, to evaluate compliance. See Pet. App. 4a-5a.

The credible evidence provisions give EPA greater flexibility to use substitute methodology, in light of practical considerations and technological advances, to evaluate environmental compliance. Nevertheless, the specific reference test set forth in the applicable SIP, NSPS, or NESHAP regulation remains the benchmark for measuring compliance. EPA's "credible evidence" must relate to what the reference test would have shown if it had been performed. Specifically, the substitute methodology must reliably measure the pollutant in the same concentration or mass over the same time period. See 62 Fed. Reg. at 8314-8315.

2. Petitioners challenged the credible evidence provisions by filing petitions for review in the United States Court of Appeals for the District of Columbia Circuit in accordance with Section 307(b) of the CAA, 42 U.S.C. 7607(b), which provides for pre-enforcement review of final agency actions in the appropriate court of appeals. Section 307(b)(1) states:

> Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation * * * appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

42 U.S.C. 7607(b)(1). Section 307(b)(2) further provides:

> Action of [EPA] with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

42 U.S.C. 7607(b)(2).

Petitioners contended in their petitions for review that EPA lacked statutory authority to adopt regulations that allow use of credible evidence in lieu of the performance or reference tests. Pet. App. 5a. They further argued that EPA was obligated to conduct a rulemaking on each of the NSPS and NESHAPS standards that would be affected by the credible evidence provisions. See *ibid.* As the court of appeals explained, "[t]he heart of the argument is that the credible evidence rule, by altering the means of determining compliance for the [NSPS and NESHAP regulations], increases the stringency of the underlying standards." *Ibid.* As the court also explained, "EPA's short answer is that there was no need for such proceedings [to revise the NSPS and NAAQS standards] because the standards have not been changed." *Ibid.* The court of appeals did not resolve that dispute. Applying this Court's decisions in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967); and *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967), the court of appeals ruled that petitioners' challenges are not ripe for judicial determination and dismissed the petitions for review. Pet. App. 7a-16a.

The court of appeals concluded that petitioners' contentions "have raised issues that are not purely legal, issues that are not suitable for decision in the abstract." Pet. App. 8a-9a. The court explained that petitioners' contentions present "too many imponderables" because "application of EPA's credible evidence rule in the place of a reference test may potentially affect some standards but not others." *Id.* at 9a-10a. The court stated that "credible evidence is not a closed set" and that, "[g]iven the universe[] of all possible evidence

that might be considered 'credible,' it is impossible for us to decide now what impact the rule will have." *Id.* at 10a. "An enforcement action brought on the basis of credible evidence would, we believe, provide the factual development necessary to determine whether the new rule has affected whatever existing standard is involved." *Ibid.*

In addition, the court of appeals found that petitioners "cannot point to any great hardship" from deferral of judicial review, particularly since the "rule does not require [petitioners] 'to engage in, or to refrain from, any conduct.'" Pet. App. 10a (quoting *Texas* v. *United States*, 523 U.S. 296, 301 (1998)). The court compared the situation here to that in *Toilet Goods Ass'n*, 387 U.S. at 164, where this Court concluded that the agency action was unripe for review. The court noted that the petitioners "need not change their behavior or risk costly sanctions." Pet. App. 10a. "Source owners and operators are already under an obligation to comply with EPA's emission standards." *Ibid.* "If the credible evidence rule has in fact altered these standards, petitioners can raise that as a defense in an enforcement action." *Ibid.*

The court of appeals also found unripe petitioners' additional challenge that the credible evidence provisions improperly convert "'periodic' standards to 'continuous' ones." Pet. App. 11a. The court concluded that the effect of the credible evidence provisions on compliance obligations "is difficult to assess without any information or experience showing how the rule operates in particular settings." *Ibid.* The court similarly rejected petitioners' claims that the credible evidence provisions improperly modify SIPs. The court noted at the outset that "[i]t is not at all apparent that use of credible evidence alters the emissions standards gov-

erning petitioners' activities." *Id.* at 14a. It further stated that "the effect of the credible evidence rule on petitioners—that is, the effect of language in state plans specifying that use of credible evidence is not precluded—is highly uncertain for reasons already mentioned." *Ibid.* The court also observed that an amicus brief submitted by state air pollution authorities indicates that States already employ credible evidence in enforcement actions. *Id.* at 14a-15a. In light of those considerations, the court concluded that "our judicial appraisal 'is likely to stand on a much surer footing in the context of a specific application of the regulation.'" *Id.* at 15a (quoting *Toilet Goods Ass'n*, 387 U.S. at 164).

ARGUMENT

The court of appeals reasonably concluded that petitioners' challenges to EPA's credible evidence provisions are not ripe for judicial review. The court of appeals' decision, which simply applies familiar legal principles to a narrow and fact-bound regulatory context, does not conflict with any decision of this Court or another court of appeals. Indeed, the court of appeals' decision merely postpones judicial review until the time when the credible evidence provisions can be applied to a concrete enforcement setting.

1. This Court's decisions in *Abbott Laboratories* v. *Gardner*, *Toilet Goods Ass'n* v. *Gardner*, and *Gardner* v. *Toilet Goods Ass'n*, *supra*, articulate the fundamental principle that courts shall not review agency action if that action is not ripe for judicial review. The Court has adopted that principle in light of the proper institutional role of the Judicial Branch. Although ripeness doctrine "is drawn from both Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction," *Reno* v. *Catholic Soc.*

Servs., Inc., 509 U.S. 43, 57 n.18 (1993), the dispute in this case focuses on the prudential aspects of the doctrine.

The "basic rationale" of the prudential ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs.*, 387 U.S. at 148-149. The ripeness doctrine requires courts "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149; accord *Toilet Goods Ass'n*, 387 U.S. at 162; *Gardner*, 387 U.S. at 170. See *Ohio Forestry Ass'n* v. *Sierra Club*, 118 S. Ct. 1665, 1690 (1998); *Texas* v. *United States*, 523 U.S. at 300-301.

Petitioners do not contend that the court of appeals erred in applying the two-part test that this Court articulated in *Abbott Laboratories* and has applied in *Toilet Goods Ass'n*, *Gardner*, and numerous other cases. Indeed, the court of appeals' decision rests on a routine application of the two-part test. The court explained that it found petitioners' challenges to the credible evidence provisions to be not currently fit for judicial review because the court would need to evaluate whether, as petitioners assert, the use of "credible evidence" in place of a specific performance test actually modifies the various regulatory standards that may be affected by those provisions. The court of appeals concluded that a court cannot make that judgment in the abstract, but must instead evaluate the effect of using substitute methodology in the context of a specific enforcement action. See Pet. App. 8a-11a, 14a-

15a. Furthermore, postponing review until the agency actually uses the substitute methodology in a specific case does not impose any meaningful hardship on the parties because, as the court of appeals also explained, the credible evidence provisions do not purport to change the underlying regulatory standards. If they have "in fact altered these standards, petitioners can raise that as a defense in an enforcement action." *Id.* at 10a. See also *id.* at 13a-14a. The court of appeals' reasonable application of well established ripeness doctrine to the regulations at issue here plainly does not warrant this Court's review. See Sup. Ct. R. 10.

2. Petitioners argue that this Court's review is nevertheless warranted because, in their view, Section 307 of the CAA, 42 U.S.C. 7607, which provides for pre-enforcement review of final EPA action under the CAA, absolutely precludes the court of appeals from applying the ripeness doctrine. Pet. 16. According to petitioners, Congress's creation of a mechanism for pre-enforcement judicial review should be treated as categorically prohibiting the courts from considering ripeness principles. Pet. 16-23. Petitioners' contention is unpersuasive and does not present an issue warranting this Court's review.

a. Congress can require a federal court to resolve Article III "Cases" or "Controversies" (U.S. Const. Art. III, §2) without regard to the court's self-imposed "prudential" limitations on the court's own powers, including limitations arising from the prudential doctrine of ripeness. See *Department of Commerce* v. *United States House of Representatives*, 119 S. Ct. 765, 772 (1999); *Raines* v. *Byrd*, 521 U.S. 811, 820 n.3 (1997); *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 894 (1990). The question here, however, is not one of congressional power, but rather one of congressional

intent. Petitioners contend that, when Congress authorized pre-enforcement review of CAA regulations through Section 307 of the CAA, it must have intended, sub silentio, entirely to preclude courts from applying the pre-existing prudential doctrine of ripeness. Neither the text nor the purpose of Section 307, however, supports that extreme construction.

Section 307 of the CAA does not expressly address the application of ripeness principles. Rather, Section 307(b)(1) directs that "[a]ny petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation * * * appears in the Federal Register." 42 U.S.C. 7607(b)(1). Significantly, Section 307 does not state that the court of appeals must decide the petition on the merits without any regard whatsoever to prudential principles governing judicial review. To the contrary, Section 307 recognizes that not every regulatory action will be susceptible to immediate judicial review. Section 307(b)(2) states that agency actions "with respect to which review *could have been obtained* under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. 7607(b)(2) (emphasis added). Congress clearly understood that immediate judicial review would not be available in some situations and that judicial review in those circumstances would take place, as it traditionally does, when the agency undertakes specific enforcement action. See *Texas*, 523 U.S. at 302; *Toilet Goods Ass'n*, 387 U.S. at 164.

The court of appeals' conclusion that Congress preserved the court's authority to apply ripeness principles when reviewing EPA regulations is consistent with the objectives of Section 307. Section 307's pre-enforcement review provisions allow regulated entities to test

the validity of CAA regulations, within a strictly limited time period, before those entities must conform their conduct to new regulatory requirements. When properly applied, the ripeness doctrine does not interfere with Section 307's core objective of providing an avenue for judicial review of a regulation before it affects primary conduct. That doctrine postpones judicial review only if review is impractical and postponing review would not impose a significant hardship on the parties. See *Abbott Labs.*, 387 U.S. at 148-149. As so applied, the ripeness doctrine actually complements the Section 307's function. In granting the courts of appeals jurisdiction to conduct pre-enforcement review, Congress had good reason to preserve adequate discretion in those courts to postpone review if the reviewing court determined that it could not resolve the pre-enforcement challenge in the abstract and that postponing review until the agency takes enforcement action would not harm the affected parties.

We recognize that the courts should fully take into account Congress's decision to authorize pre-enforcement review as an important factor bearing on the question of ripeness. See *Ohio Forestry Ass'n*, 118 S. Ct. at 1672; *National Wildlife Federation*, 497 U.S. at 891. When conducting a ripeness analysis under *Abbott Laboratories*, a court should give weight to Congress's general judgment that a particular regulatory program would benefit from immediate review of agency regulations. Congress's conception of how a regulatory program should operate is clearly relevant in assessing whether a specific regulatory dispute is fit for judicial review and whether postponing judicial review would cause undue hardship to the parties. See, *e.g.*, *Eagle-Picher Indus., Inc.* v. *EPA*, 759 F.2d 905, 916-918 (D.C. Cir. 1985). Indeed, lack of such hardship alone would

not ordinarily warrant postponement of congressionally-favored pre-enforcement review if the issues are fit for adjudication at that stage. See, *e.g.*, *George E. Warren Corp.* v. *EPA*, 159 F.2d 616, 622 (1998), amended, 164 F.3d 676 (D.C. Cir. 1999).

There is no reason to believe, however, that Congress meant to deprive a reviewing court of any latitude to make a judgment about ripeness in light of the specific nature of the dispute before the court. This case illustrates why that is so. The core dispute among the parties is whether the credible evidence provisions will or will not have *any* substantive effect on existing standards and regulatory obligations. The court of appeals reasonably concluded that this issue, which the court found to depend on the nature of the particular evidence at issue, cannot be evaluated in the abstract and should be postponed until the agency attempts to apply specific credible evidence in a concrete enforcement setting. If Congress had intended the extraordinary result that courts must conduct a pre-enforcement review, even when the court reasonably concludes that it cannot effectively do so and that no harm would come from postponing review, then Congress presumably would have said so in express terms.

b. Even if there were greater force to petitioners' arguments, this case would not warrant review by this Court. The question whether Section 307 entirely precludes a court from considering ripeness principles presents a question of statutory construction, and this Court does not ordinarily review such questions in the absence of a conflict among the courts of appeals. Petitioners can point to no such conflict on the question presented here. A conflict is possible, because Section 307 provides for judicial review of agency actions in courts of appeals other than the D.C. Circuit. See 42

U.S.C. 7607(b)(1). Nevertheless, no square conflict has emerged.

The absence of a conflict is not surprising because, as a general matter of administrative law, the issue of ripeness of final agency rules under pre-enforcement review statutes does not appear to arise with great frequency. When the issue has arisen in other statutory contexts, the D.C. Circuit has consistently applied the *Abbott Laboratories* framework in the course of conducting pre-enforcement review. Pet. App. 7a-8a. See, *e.g.*, *Association of Am. Railroads* v. *Surface Transp. Bd.*, 146 F.3d 942 (1998); *American Iron & Steel Inst.* v. *EPA*, 115 F.3d 979, 999 (1997); *Baltimore Gas & Elec. Co.* v. *ICC*, 672 F.2d 146 (1982). The only court of appeals decision that petitioners cite as contrary authority is the Second Circuit's decision in *Ciba-Geigy Corp.* v. *Sidamon-Eristoff*, 3 F.3d 40, 46 (1993), which addressed an EPA permitting decision under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.* The excerpt of dictum that petitioners quote (Pet. 22), however, does not fairly reflect the court's ruling. The court responded to EPA's contention that the dispute was not ripe as follows:

> Arguably, decisions like *Abbott Laboratories* have limited relevance to Ciba's challenges, since RCRA specifically authorizes review in the Court of Appeals of the "Administrator's action (1) in issuing, denying, modifying or revoking any permit under section 6925 . . ., or (2) in granting, denying, or withdrawing authorization or interim authorization under section 6926." 42 U.S.C. § 6976(b). Thus, this may be a situation in which "Congress explicitly provides for our correction of the administra-

> tive process at a higher level of generality," *see Lujan v. National Wildlife Federation*, 497 871, 894 (1990), than the usual ripeness test demands. *But see W.R. Grace & Co.— Conn. v. U.S. E.P.A.*, 959 F.2d 360, 364-67 (1st Cir. 1992) (applying general test of ripeness to permit dispute reviewable under 42 U.S.C. § 6976(b)(1)).
>
> Even under the general test, however, we believe that the original permitting decision reviewed by [EPA's Environmental Appeals Board] is ripe for review.

3 F.3d at 46 (parallel citations omitted). As the full excerpt makes clear, the Second Circuit merely observed that, "[a]rguably," the general ripeness test set out in *Abbott Laboratories* has "limited relevance" in light of Congress's provision of pre-enforcement review provisions. The court nevertheless applied the "general test" in that case. The Second Circuit did not hold, or even suggest, what petitioners argue here—that pre-enforcement review provisions bar the court from considering ripeness principles.

Finally, there is no pressing need for this Court's review because the matter has not only failed to arise frequently or to give rise to a circuit conflict, but the effect of the court of appeals' decision is merely to postpone review in the context where the court of appeals has explicitly concluded, after examining the character of the specific dispute, that delaying review until the agency undertakes enforcement action will not impose substantial hardship on the parties. See, *e.g.*, Pet. App. 10a-11a. Petitioners' contrary hyperbole that the court of appeals' decision creates "a dangerous precedent" that "creates havoc for regulatory agencies,

regulated entities, and the public at large" (Pet. 23) is without support.[1]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1999

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[1] Petitioners have also brought related challenges in the court of appeals seeking to set aside numerous individual NSPS and NESHAP regulations on the basis that the credible evidence provisions changed those standards without appropriate rulemaking. *Appalachian Power Co.* v. *EPA*, No. 97-1121 (D.C. Cir.). On April 29, 1999, relying on its decision in this case, the court of appeals dismissed those petitions as not ripe for review.

Supreme Court, U.S.
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No. 98-1330

IN THE
Supreme Court of the United States

APPALACHIAN POWER COMPANY, *et al.*,
Petitioners,
v.
ENVIRONMENTAL PROTECTION AGENCY,
UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, amendments to the previously filed corporate disclosure statement are included below. The page numbers of the Appendix, on which the corporations requiring amended statements appear, are included for convenience.

Central Illinois Public Service Company (84a) is now referred to as: AmerenCIPS

CINergy Corp. (85a) now lists its subsidiaries in the following manner:

Subsidiaries:

The Cincinnati Gas and Electric Company

Subsidiaries:

KO Transmission Company

Subsidiaries:

Lawrenceberg Gas Company

Miami Power Corporation
Tri-State Improvement Co.
Union Light, Heat and Power Company
The Western Harrison Gas and Electric Company

Cinergy Investment

Subsidiaries:

Cinergy-Cadence, Inc.
Cinergy Resources, Inc.

Cinergy Services
PSI Energy, Inc.

Kansas City Power & Light (89a) no longer lists KLT Power, Inc. as a subsidiary

Ohio Power Company (91a) now lists Cardinal Operating Co. as a subsidiary

PacifiCorp (91a-92a) no longer lists the following corporations as subsidiaries:

Cascade Autovon Co.
Gem State Utilities Corporation
Inter Island Telephone Co., Inc.
International Communications Holdings, Inc.
Northwestern Telephone Systems, Inc.
Pacific Telecom Cellular, Inc.
Telephone Utilities of Alaska, Inc.
Telephone Utilities of Eastern Oregon, Inc.
Telephone Utiliites of Oregon, Inc.
Telephone Utilities of Washington, Inc.

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MISCELLANEOUS

Judge A. Raymond Randolph, *Administrative Law and the Legacy of Henry J. Friendly*, 74 N.Y.U. L. Rev. 1 (April, 1999) 2

ARGUMENT

The Government asserts that the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") and other federal Courts of Appeals can refuse a clear congressional command to those courts to undertake prompt, pre-enforcement review of final legislative rules on the basis of the prudential ripeness doctrine in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (hereafter "*Abbott Labs*") and its progeny. Without responding directly to many of Petitioners' arguments, the Government contends that certiorari should not be granted in this case. According to the Government, the Circuit Court with jurisdiction to review all final, nationally applicable legislative rules promulgated by EPA has unconstrained discretion to apply the *Abbott Labs* test of prudential ripeness and thereby pick and choose which final rules to review unless Congress states "in express terms" that the *Abbott Labs* test does not apply.

Abbott Labs involved judicial review in a district court under generic "federal question" jurisdiction. "Federal question" jurisdiction applies universally to all cases arising under federal law. Since it embodies no specific judgment regarding which cases shall be reviewed, it allows courts to apply judicially created "prudential" standing and ripeness doctrines to decline review. By contrast, statutes like the Clean Air Act ("CAA" or "Act") that mandate pre-enforcement judicial review of specified agency actions have never been interpreted by this Court to allow lower courts to dismiss a case on "prudential" standing or ripeness grounds. In these statutes, unlike the federal question statute, Congress has specifically directed reviewing courts to exercise jurisdiction.[1]

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[1] Petition for Writ of Certiorari ("Pet.") at 16-20.

The D.C. Circuit clearly has a different view of the law. Judge Randolph, the author of the opinion at issue in this case, explained in a recent speech to the District of Columbia bar:

> Before we leave *Abbott Laboratories* I would like to comment on the current state of affairs regarding pre-enforcement review of agency regulations. There is, I believe, a serious question whether, since 1967, *the pendulum has swung too far in favor of permitting such review*. Increasingly, our court is confronted with regulations of the most abstract nature, often dealing with complex technological subjects. . . . *I am more than a little uncomfortable with the system as it has evolved* since *Abbott Laboratories*, which imposes on courts the burden of deciding the validity of rules in the absence of concrete settings. *I think the time has come for us to be more discriminating* . . . .[2]

The "pendulum" Judge Randolph refers to was "swung" by Congress in numerous statutes enacted in the two decades following *Abbott Labs*. In those statutes, Congress directed Circuit Courts to review legislative rules prior to enforcement. While judges in those courts may be "uncomfortable" with that system, it is for Congress, not the courts, to decide that the pendulum has swung too far and that these statutes should be amended to allow courts to decide which rules will be reviewed prior to enforcement based on a subjective balancing of the *Abbott Labs* factors. For this reason and the reasons below, certiorari should be granted in this case.

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[2] Judge A. Raymond Randolph, *Administrative Law and the Legacy of Henry J. Friendly*, 74 N.Y.U. L. Rev. 1, 9-10 (April, 1999) (revised text of speech to the District of Columbia Bar, June 23, 1998) (emphasis added).

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE WHETHER *ABBOTT LABS* ALLOWS CIRCUIT COURTS TO DISMISS CASES ON PRUDENTIAL RIPENESS GROUNDS WHERE CONGRESS DIRECTED PROMPT, PRE-ENFORCEMENT REVIEW OF FINAL LEGISLATIVE RULES.

The Government asserts that the decision below "rests on a routine application of the two-part [*Abbott Labs*] test" for prudential ripeness.[3] The Government fails to note, however, that the D.C. Circuit applied *Abbott Labs* to a statutory context different from the one in which it arose. There should be nothing "routine" about application of the *Abbott Labs* test to judicial review of final legislative rules under § 307 of the Act and numerous similar provisions enacted by Congress after *Abbott Labs*. *See generally* Pet. at 14-15.

The Government acknowledges that Congress can require a federal court to resolve legal actions "*without regard to the court's self-imposed 'prudential' limitations on the court's own powers, including limitations arising from the prudential doctrine of ripeness.*" Resp. Brief at 9 (emphasis added). The Government maintains, however, that Congress' power to foreclose application of the prudential ripeness doctrine is not at issue because Congress did not intend to do so under the Act. More specifically, the Government argues that § 307 does not explicitly state that "the court of appeals must decide the petition on the merits without any regard whatsoever to prudential principles governing judicial review." *Id.* at 10. This formulaic argument lacks merit.

Although the Government is correct that § 307 does not expressly declare that "the court of appeals must decide the petition on the merits without any regard whatsoever

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[3] Brief for the Respondent in Opposition ("Resp. Brief") at 8.

to prudential principles governing judicial review," the absence of such language does not mean (or imply) that Congress intended a different result. To the contrary, the same result is confirmed simply by reading § 307 *in its entirety*. No better evidence of this fact exists than the Government's inability to provide *any* interpretation of §§ 307(d)(6)(C), 307(d)(7) and 307(e), or the legislative history of § 307 generally, that supports application of *Abbott Labs* to judicial review of final legislative rules under § 307. *See* Pet. at 4-7, 16-20.

Indeed, neither the D.C. Circuit in its decision, nor the Government in its opposition, address the full array of provisions under § 307 or its detailed legislative history.[4] The only provision of § 307 referenced by the Government in support of its opposition is § 307(b)(2), but this reference is to no avail. Congress included § 307(b)(2) to make clear that actions reviewable under § 307(b)(1) in Circuit Courts are not reviewable in District Courts in enforcement proceedings. The provision has nothing to do with "prudential" ripeness principles and says nothing about the jurisdiction of the Circuit Court to review EPA actions under § 307(b)(1). To read § 307(b)(2) as authorizing Circuit Courts to decline jurisdiction granted under § 307(b)(1) stands § 307(b) on its head.[5]

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[4] The Government asserts that the D.C. Circuit explicitly concluded "that Congress preserved the court's authority to apply ripeness principles" under § 307 of the Act. Resp. Brief at 10. In fact, the D.C. Circuit simply *assumed* that it could refuse to exercise its jurisdiction on prudential ripeness grounds without consideration of § 307 in its entirety, which considerations presumably would have occurred if the court had ordered briefing on the issue of prudential ripeness (which it did not).

[5] It also gives District Courts jurisdiction to review final agency District Court concludes that a Circuit Court might not have reviewed the action on prudential ripeness grounds had a petition been filed.

The Government also makes no attempt to rebut Petitioners' detailed assessment of this Court's decisions in *Abbott Labs* and its progeny as those cases relate to pre-enforcement review of final legislative rules. *See* Pet. at 20-23. The Government concedes only that "Congress's decision to authorize pre-enforcement review [is] an important factor bearing on the question of ripeness." Resp. Brief at 11. The Government's concession is far too grudging. This Court has recognized that Congress' wishes regarding pre-enforcement review are not merely a "factor" to be considered, but binding directives to be followed. *See, e.g., Ohio Forestry Ass'n, Inc. v. Sierra Club*, 118 S. Ct. 1665, 1672 (1998); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 894 (1990); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980); *Abbott Labs*, 387 U.S. at 146.

Nor is there merit to the Government's assertion that "[i]f Congress had intended the extraordinary result that courts must conduct a pre-enforcement review [without consideration of prudential ripeness] . . . then Congress presumably would have said so in express terms." Resp. Brief at 12. The plain language of § 307 accomplishes precisely this result when read in its entirety. Moreover, this Court rejected the Government's proposed approach for interpreting § 307 in a related setting, noting that "a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Harrison v. PPG Indus., Inc.*, 446 U.S. at 592. In the Court's view, "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of the statute." *Id. Compare Bennett v. Spear*, 117 S. Ct. 1154, 1162 (1997) (holding that Congress "expressly negated" prudential standing concerns even

though statute makes no explicit reference to prudential standing).

The Government maintains the D.C. Circuit determined that the credible evidence petitions could not be "evaluated in the abstract" and therefore postponed review "until the agency attempts to apply specific credible evidence in a concrete enforcement setting." Resp. Brief at 12. The Government's arguments simply parrot those made by the D.C. Circuit in its decision and are equally unpersuasive.

Petitioners raised a series of purely legal challenges, including several procedural challenges, to the credible evidence rule. Pet. at 9-11. Resolution of those legal challenges *does not depend to any degree on whether "concrete" credible evidence might or might not be different from, or more stringent in effect than, the applicable results from the performance tests prescribed by regulation.* Like the D.C. Circuit, the Government never explains why resolution of these purely legal issues must await the "concrete setting" sought by the D.C. Circuit. Indeed, this Court has noted that persons injured by an agency's failure to adhere to procedural requirements "may complain of that failure *at the time the failure takes place, for the claim can never get riper.*" *Ohio Forestry Ass'n*, 118 S. Ct. at 1672 (emphasis added).

The Government's assertion that the postponement of review does "not harm the affected parties" is similarly misguided. *See* Resp. Brief at 11. Whether Petitioners suffer harm by virtue of delayed judicial review is not a relevant consideration under a statute such as CAA § 307. So long as Petitioners have suffered harm sufficient to satisfy Article III's "case or controversy" requirement —a point not disputed in this case—Congress is, as the Government concedes, free to eliminate application by a

reviewing court of prudential justiciability doctrines. Resp. Brief at 9. This is precisely what § 307 accomplishes.

In any event, Congress recognized that "[a]dministratively developed standards, rules and regulations under the Act . . . *clearly affect the interests of parties.*" App. 68a (emphasis added). Congress commanded that judicial review occur "within controlled time periods" for this very reason. *Id.*

Despite the Government's claims to the contrary, the credible evidence rule has binding legal effect on petitioners who must now consider the possibility that they may be subjected to criminal, as well as civil and administrative penalties, *based on information, such as continuous opacity monitoring data, that prior to the credible evidence rule was completely irrelevant to compliance determinations. See* Pet. at 7-9.[6] Some at least, such as those who may lack complete confidence in the judicial system or those who have a strong aversion to even the possibility of being sent to prison, will be forced to meet more stringent standards to avoid the alternative of having to develop and present "a defense in an enforcement action" on which the D.C. Circuit's decision and the Government's opposition so squarely rests.

The legislative history is clear that Congress intended to strictly time-limit the D.C. Circuit's jurisdiction to review final legislative rules "affect[ing] the interests" of regulated parties "unless a petitioner can show that *the basis for his challenge did not exist or was not reasonably to be anticipated before the expiration of 60 days.*" App. 68a, 77a-78a (emphasis added). There is no dispute in

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[6] Under § 113(b) of the Act, courts can impose civil penalties of $25,000 per day for each violation. 42 U.S.C. § 7413(b). Under § 113(c), a person may be imprisoned for up to five years for a single violation. *Id.* § 7413(c).

this case that the "basis" for Petitioners' challenge to the credible evidence rule arose within the designated 60 day period. Nothing in the D.C. Circuit's decision or the Government's opposition suggests that the case involves anything other than "merely postpon[ing] judicial review" as a matter of judicial prudence. Resp. Brief at 7. The D.C. Circuit has determined that the "basis" for Petitioners' challenge may only be reviewed at a time and in a forum (i.e., district court) different from that directed by Congress. This the D.C. Circuit simply cannot do. Pet. at 17-18; App. 77a-78a.

In short, the Government fails to provide a sound basis for denying certiorari in this case. Contrary to the Government's bald assertion that the D.C. Circuit's decision "does not conflict with any decision of this Court," [7] the D.C. Circuit's decision fundamentally misconstrues this Court's seminal decisions on the issues of prudential ripeness as it applies to congressionally mandated Circuit Court pre-enforcement review of final legislative rules.

II. CERTIORARI SHOULD BE GRANTED TO AVOID AN UNWIELDY AND ILL-DEFINED PROCESS OF JUDICIAL REVIEW OF FINAL AGENCY ACTIONS.

The Government contends alternatively that, even if Petitioners' claims had merit, this Court should not grant certiorari because there is no split in the Circuit Courts regarding application of *Abbott Labs* to statutes such as CAA § 307. Resp. Brief at 12-13. The Government's reliance upon the absence of a direct circuit split is unpersuasive because the D.C. Circuit has exclusive responsibility to review final legislative rules of nationwide scope arising under the Act and many other similar federal stat-

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[7] Resp. Brief at 7.

utes.[8] As Judge Levanthal recognized long ago, one of the principal objectives of § 307(b) was "*to avoid conflicting holdings by various federal courts of appeals*" regarding the validity of rules of nationwide scope under the Act. *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 849-50, n.15 (D.C. Cir. 1972) (emphasis added). Thus, far from supporting denial of certiorari, the absence of a circuit split further highlights *why review by this Court is essential.* The D.C. Circuit alone decides judicial policy in this area, subject only to this Court's oversight.

Finally, the Government complains that Petitioners have engaged in "hyperbole" in characterizing the D.C. Circuit's decision as "a dangerous precedent." Resp. Brief at 14. The Government is unable, however, to provide answers to *any* of the many questions raised by the D.C. Circuit's decision regarding further review of the credible evidence rule. *See* Pet. at 23-25. This suggests that the Government is as baffled as Petitioners regarding the implications of the D.C. Circuit's decision for judicial review of final legislative rules.

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[8] The Government mischaracterizes the Second Circuit's decision in *Ciba-Geigy Corp. v. Sidamon-Eristoff*, 3 F.3d 40 (2d Cir. 1993) by suggesting that the Second Circuit has embraced the *Abbott Labs* test for prudential ripeness. Resp. Brief at 13-14. The Second Circuit ruled that the case was ripe for review *even if* the *Abbott Labs* test applied. In accordance with this Court's decisions, the Second Circuit recognized that *Abbott Labs* has "limited relevance" in cases where Congress has ordered pre-enforcement review. *Ciba-Geigy Corp.*, 3 F.3d at 46.

CONCLUSION

For the foregoing reasons, the Government's arguments in opposition to certiorari are without merit and the petition for a writ of certiorari to the D.C. Circuit should be granted.

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